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Supreme Court, U.S.
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No. 95- _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

TALAL H. ALZANKI,

*Petitioner*,

v.

UNITED STATES OF AMERICA,

*Respondent*.

Petition For A Writ of Certiorari To The
United States Court of Appeals For The First Circuit

## PETITION FOR A WRIT OF CERTIORARI

MARC E. MILLER
*Counsel of Record*
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

*Counsel for Petitioner*

62 pp

## QUESTIONS PRESENTED

1. Whether the safeguards set forth in this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), for admission of evidence under Federal Rule of Evidence 702 apply to expert psychological testimony.

2. Whether a district court's decision to admit evidence under Federal Rule of Evidence 702 is subject to de novo review in the court of appeals or simply review for abuse of discretion.

3. Whether a threat of deportation to a friendly country can satisfy the physical or legal coercion requirement of the involuntary servitude statute, 18 U.S.C. § 1584.

## PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioner Talal H. Alzanki and respondent United States of America.

## TABLE OF CONTENTS

Page

OPINIONS BELOW . . . . . 1

JURISDICTION . . . . . 1

STATUTORY PROVISIONS INVOLVED . . . . . 2

STATEMENT . . . . . 2

1. Background . . . . . 3

2. Proceedings Below . . . . . 5

REASONS FOR GRANTING THE WRIT . . . . . 7

I. THE DECISION IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICATION OF THE *DAUBERT* STANDARD. . . . . 7

A. There is a Conflict Among the Circuits About Whether Daubert Applies to Specialized or Other Non-Scientific Knowledge. . . . 8

B. Clarification of When *Daubert* Applies is Particularly Important for the Type of Testimony Presented By the Victimologist in This Case. . . . . 11

II. IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS. . . . . 13

**TABLE OF CONTENTS**
**(Continued)**

**Page**

III. THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT . . . . . 15

CONCLUSION . . . . . 18

## TABLE OF AUTHORITIES

Page

### CASES

*Bailey v. Alabama*, 219 U.S. 219 (1911) . . . . . 16
*Berry v. City of Detroit*, 25 F.3d 1342 (6th ir. 1994), *cert. denied*, 115 S. Ct. 902 (1995) . . . . . 9
*Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994) . . . . . 14
*Claar v. Burlington Northern R.R.*, 29 F.3d 499 (9th Cir. 1994) . . . . . 14
*Clyatt v. United States*, 197 U.S. 207 (1905) . . . . . 16
*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) . . . . . 2, 7, 9
*Downs v. Department of Public Welfare*, 368 F. Supp. 454 (E.D. Pa. 1973) . . . . . 16
*Frye v. United States*, 293 F. 1013 (1923) . . . . . 14
*Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994) . . . . . 9
*In Re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3rd Cir. 1994), *cert. denied sub nom. General Electric Co. v. Ingram*, 115 S. Ct. 1253 (1995) . . . . . 14
*Jobson v. Henne*, 355 F.2d 129 (2d Cir. 1966) . . . . . 16
*Pollock v. Williams*, 322 U.S. 4 (1944) . . . . . 16
*Robinson v. Missouri Pacific R.R.*, 16 F.3d 1083 (10th Cir. 1994) . . . . . 9
*Santiago v. City of Philadelphia*, 435 F. Supp. 136 (E.D. Pa. 1977) . . . . . 16

**TABLE OF AUTHORITIES**
**(Continued)**

**Page**

*Thomas v. Newton Int'l Enterprises*,
42 F.3d 1266 (9th Cir. 1994) . . . . . 10
*United States v. Amador-Galvan*, 9 F.3d 1414
(9th Cir. 1993) . . . . . 9
*United States v. Bonds*, 12 F.3d 540
(6th Cir. 1993) . . . . . 14
*United States v. Booker*, 655 F.2d 562
(4th Cir. 1981) . . . . . 16
*United States v. Dorsey*, 45 F.3d 809 (4th Cir.),
*cert. denied*, 115 S. Ct. 2631 (1995) . . . . . 14
*United States v. Harris*, 701 F.2d 1095 (4th Cir.),
*cert. denied*, 463 U.S. 1214 (1983) . . . . . 16
*United States v. King*, 840 F.2d 1276 (6th Cir. 1988),
*cert. denied sub nom. Lewis v. United States*,
488 U.S. 894 (1988) . . . . . 16
*United States v. Kozminski*,
487 U.S. 931 (1988) . . . . . 6, 15, 16, 17
*United States v. Locascio*, 6 F.3d 924 (2d Cir. 1993),
*cert. denied*, 114 S. Ct. 1646 (1994) . . . . . 10
*United States v. Markum*, 4 F.3d 891
(10th Cir. 1993) . . . . . 9
*United States v. Reynolds*, 235 U.S. 133 (1914) . . . . . 16
*United States v. Rincon*, 28 F.3d 921 (9th Cir.),
*cert. denied*, 115 S. Ct. 605 (1994) . . . . . 11
*United States v. Shackney*, 333 F.2d 475
(2d Cir. 1964) . . . . . 15, 16
*Wilson v. City of Chicago*, 6 F.3d 1233 (7th Cir.
1993), *cert. denied*, 114 S. Ct. 1844 (1994) . . . . . 11

## TABLE OF AUTHORITIES
(Continued)

Page

**STATUTES**

Fed. R. Evid. 702 . . . . . 2
18 U.S.C. § 371 (1988 & Supp. VI) . . . . . 2, 5
18 U.S.C. § 1584 (1988 & Supp. VI) . . . . . *passim*
28 U.S.C. § 1254(1) . . . . . 1

**MISCELLANEOUS**

Lisa Askowitz and Michael Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027 (1994) . . . . . 12

Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345 (1994) . . . . . 13

Developments, *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481 (1995) . . . . . 10, 11, 13

David L. Faigman, Elise Porter and Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Furture of Scientific Evidence*, 15 Cardozo L. Rev. 1799 (1994) . . . . . 14

Paul Giannelli, *Junk Science: The Criminal Cases*, 84 J. Crim. L. & Criminology 105 (1993) . . . . . 13

David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 Oregon L. Rev. 19 (1987) . . . . . 12

Andrea Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 2 (1993) . . . . . 13

John Monahan and Lauren Walker, *Judicial Use of Social Science Research After Daubert*, 2 Shepard's Expert and Scientific Evidence Q. 327 (1994) . . . . . 12

**TABLE OF AUTHORITIES**
**(Continued)**

**Page**

Diana K. Sheiness, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 Wash. L. Rev. 481 (1994) . . . . 10
David O. Stewart, *A New Test*, 79 ABA Journal 48 (1992) . . . . . 12

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UNITED STATES OF AMERICA,

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**Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner Talal H. Alzanki respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

## OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 54 F.3d 994 and reprinted at pages 1a-24a of the appendix to this petition.

## JURISDICTION

The Court of Appeals for the First Circuit entered its judgment on June 1, 1995. On August 21, 1995, on application of petitioner, Justice Souter extended the time in which to file the petition for writ of certiorari to and including October 16, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Rule 702, Federal Rules of Evidence, provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert of knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

18 U.S.C. § 1584 (1988 & Supp. VI) provides:

Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 371 (1988 & Supp. VI) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

## STATEMENT

This case grew out of a conviction for violation of 18 U.S.C. § 1584, the involuntary servitude statute. The "coercion" found to satisfy the statute was threats of deportation to a friendly country. In an effort to explain why these threats constituted coercion, the government introduced, over petitioner's objection, the testimony of a nurse, who was described as a "victimologist," who testified that the "special vulnerabilities" of the complainant in this case prevented her from leaving even though there was no physical restraint. The case then presents three important questions: *first*, whether the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), apply to psychological testimony proffered by an expert; *second*, whether

appellate review of a district court's determinations about expert testimony is *de novo* or simply for abuse of discretion; and *third*, whether the threat of deportation satisfies the physical or legal coercion requirement under 18 U.S.C. § 1584.

**1. Background**

Petitioner Talal Alzanki and his wife Abair, both citizens of Kuwait, came to the United States in January 1992 so that Mr. Alzanki could pursue a degree in electrical engineering at Boston University. At the time, Mrs. Alzanki was pregnant and due to give birth in August 1992. (Tr. at 9-55.)[1] They rented a two bedroom apartment in Quincy, Massachusetts, and Mrs. Alzanki began studying English at a nearby college. (Tr. at 7-57.)

On May 14, 1992, three months prior to her due date, Mrs. Alzanki gave birth to a severely handicapped baby, who was named Yousef. Due to his birth defects, which include spina bifida, Yousef remained hospitalized for more than five months until November 28, 1992. (Tr. at 7-59, 4-16.) Upon his discharge, Yousef required intensive in-home nursing treatment. (Tr. at 9-111 to 9-112.) To care for Yousef's special needs and to train the Alzankis to care for him, nursing care was provided. Initially, the nursing care was provided round-the-clock. After two weeks, the nurses spent less time at the Alzankis, and the Alzankis provided the necessary care.

Prior to Yousef's release from the hospital, Mr. Alzanki's mother, who lived in Kuwait, hired Vasantha Gedara, a native of Sri Lanka, then residing in Kuwait, to live with the Alzankis and assist them in the care of Yousef and with household duties. App. 1-2a. Ms. Gedara, who was then twenty-four years old, had moved to Kuwait in 1991 in order to obtain employment as a domestic worker. (Tr. at 3-117.) She returned to Sri Lanka four months later, after the outbreak of the Gulf War, but in

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[1] Citations to "Tr." refer to the transcript of the trial conducted before the district court.

March 1992 she again moved to Kuwait in order to obtain employment. During her time in Kuwait, Ms. Gedara worked as a housekeeper for several different families.

Ms. Gedara, who spoke English well, had been trying to come to the United States for some time. (Tr. at 4-58.) After she was hired by Mr. Alzanki's mother, Ms. Gedara flew to the United States on August 27, 1992 with all expenses paid by Mr. Alzanki and his family. (Tr. 3-141, 4-67.) As the court below described, relating the facts of this case "in the light most favorable to the verdicts," App. 1a at n.1, Mr. Alzanki took Ms. Gedara's passport upon her arrival from Kuwait and told her not to leave the apartment alone.[2] The government claimed she was "imprisoned" for a four-month period from the time she began her employment in August until she left in December.

From the time of Ms. Gedara's arrival in August until the end of November, Ms. Gedara's responsibilities were limited, as Yousef remained in the hospital. She frequently accompanied the Alzankis to visit Yousef in the hospital and, along with the Alzankis, began to learn about some aspects of his care. She also accompanied the Alzankis on shopping trips and visits with their friends. However, as she testified at trial, from the time she began working for the Alzankis through late November of that year when Yousef came home from the hospital, Ms. Gedara frequently was alone in the unlocked apartment. During the entire period of her employment, as the court below described, Ms. Gedara "often ventured outside [the Alzankis'] *unlocked* apartment . . . ." App. 15a (emphasis in original).

The court below detailed working conditions at the Alzankis: according to Ms. Gedara's testimony at trial, she was not permitted to use the telephone or mail, speak to persons other than the Alzankis, go out onto the balcony of the apartment or look out of the apartment windows. In addition, testimony was

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[2] Mr. Alzanki explained at trial that he placed Ms. Gedara's passport in a bank safe deposit box for safe keeping along with his and his wife's passports. (Tr. at 9-73, 9-74.)

elicited at trial that Ms. Gedara was denied adequate food. App. 2a. Ms. Gedara also testified that she was required to repeatedly clean the apartment, and that she did not receive adequate medical treatment. App. 2a, 13a. Ms. Gedara testified that she was assaulted on two separate occasions. App. 2a, 13a. She alleged that Mr. Alzanki kicked her pillow and grabbed her arm and threw her against the wall when she asked him to turn off the television. App. 13a. On a separate occasion, Mrs. Alzanki slapped Ms. Gedara when she did not turn off the hospital baby monitor. App. 2a. In addition, Ms. Gedara testified that Mr. Alzanki said that if anything were to happen to their son while they were away, he would kill Ms. Gedara. App. 3a.[3]

There was no testimony that Ms. Gedara was threatened with physical harm if she were to leave the Alzankis' employ. However, there was testimony at trial that the Alzankis threatened to deport Ms. Gedara to Kuwait, and testimony as well that domestic servants are not treated well in Kuwait. App. 14a at n.10.

According to testimony at trial, Ms. Gedara complained about her job to the nurses caring for Yousef. App. 3a, 21a. On December 17, 1992, some three weeks after Yousef came home from the hospital, Ms. Gedara left the Alzanki's apartment with the local police. App. 3a. She never returned to the Alzanki's apartment.

**2. The Proceedings Below**

Thereafter, a federal grand jury returned a two count indictment against Mr. and Mrs. Alzanki. App. 3a. The indictment charged the defendants with involuntary servitude and conspiracy to commit involuntary servitude in violation of 18 U.S.C. §§ 371 and 1584. *Id.* Both Mr. and Mrs. Alzanki entered pleas of not

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[3] Ms. Gedara also testified that she witnessed on one occasion Mr. Alzanki hitting his wife, and was later told by Mrs. Alzanki that Mr. Alzanki had struck her again shortly thereafter. App. 3a.

guilty. After trial commenced, a mistrial was entered as to Mrs. Alzanki, and the Government dismissed the indictment as to her, due to the birth during trial of her second child. *Id.*

Because a conviction under 18 U.S.C. § 1584 requires a finding of "physical or legal coercion," *United States v. Kozminski*, 487 U.S. 931, 948 (1988), during the trial, the Government presented evidence that Mr. Alzanki had threatened to have Ms. Gedara deported to Kuwait, a friendly country. App. 3a, 14a. Given Ms. Gedara's visa status, deportation to Kuwait would be the natural result of ceasing employment for the Alzankis.

The government offered the testimony of a nurse, Ann Burgess, a self-proclaimed "victimologist," App. 15a, to discuss "special vulnerabilities" that might have kept Ms. Gedara from leaving.[4] Ms. Burgess claimed training that "related to victims of sexual abuse," and claimed to have looked into non-sexual abuse of battered spouses and children, persons she viewed as having "unequal power relationships." App. 17a (internal quotations omitted). Ms. Burgess testified that she had never worked with "a single actual or alleged victim of involuntary servitude or slavery." (Tr. 5-73.) She had not worked with hostages of war, holocaust survivors, migrant workers who have been enslaved, or any other situation similar to that presented here. Her experience and research focused primarily on victims of rape, marital abuse, sexual assault, sexual kidnapping, incest and child sexual abuse.

Mr. Alzanki, first in a motion *in limine* and again at trial, objected to this testimony, arguing that it was not admissible under the standards announced in *Daubert*. Although the government had originally argued that the testimony was scientific and therefore within the scope of *Daubert*, at trial it urged that *Daubert* did not apply because *Daubert* "requires scientific knowledge." (Tr. 5-83). According to the government,

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[4] On January 25, 1994, petitioner moved *in limine* to exclude the testimony of Ms. Burgess. The court denied Petitioner's motion on February 15, 1994.

Ms. Burgess' testimony was instead based on specialized knowledge, training, and expertise . . . ." (Tr. 5-83). The court permitted Ms. Burgess to testify that Ms. Gedara's failure to leave was "*consistent with the behavior of abuse victims generally*" who do not leave abusive situations. App. 17a (emphasis in original).

Mr. Alzanki was convicted of a violation of 18 U.S.C. § 1584 and § 371, and sentenced to a prison term of one year and one day. The court also ordered Mr. Alzanki to make restitution in the amount of $13,403.00.

On appeal, the First Circuit upheld the conviction. The court held that the testimony of Ms. Burgess was properly admitted to show the special vulnerabilities of Ms. Gedara and did not need to be tested against the standards set forth in *Daubert*. App. 16-18a. The court also held that its review of the district court's decision to admit the testimony was not *de novo* but was simply for abuse of discretion. Addressing the sufficiency of the evidence, the court of appeals recognized that physical or legal coercion is an essential element of a violation of 18 U.S.C. § 1584, but held that the coercion element was satisfied by threats of deportation.[5]

This petition followed.

## REASONS FOR GRANTING THE WRIT

### I. THE DECISION IN THIS CASE DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICATION OF THE *DAUBERT* STANDARD.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786, 2798 (1993), recognizing that "[e]xpert evidence can be both powerful and quite misleading," this Court set forth a detailed standard for the admission of expert testimony based on

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[5] In the court below, petitioner raised other challenges to his conviction which are not involved in this petition for writ of certiorari.

scientific knowledge. Thus, under Federal Rule of Evidence 702, courts are required to determine whether the expert testimony "will assist the trier of fact to understand or determine a fact in issue." *Id.* at 2796. The test "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* Factors to be considered include whether the knowledge can be or has been tested, whether it can or has been subjected to peer review or publication, what the potential error rate is, and whether it has been generally accepted. *Id.* at 2795-2797.

This standard seeks to guarantee the validity and reliability of expert testimony prior to its admission in order to protect the integrity of the trial. *See id.* at 2797. However, in *Daubert*, this Court did not decide whether its holding extended to all expert testimony under Fed. R. Evid. 702, *i.e.*, to "technical, or other specialized knowledge" as well. *See id.* at 2795 n.8. Indeed, Chief Justice Rehnquist, concurring in part and dissenting in part, questioned: "[d]oes all this *dicta* apply to an expert seeking to testify on the basis of 'technical or other specialized knowledge' — the other types of expert knowledge to which Rule 702 applies — or are the 'general observations' [as suggested by the *Daubert* majority] limited only to 'scientific knowledge?'" *Id.* at 2800.

Since the decision in *Daubert*, conflicts have arisen among the circuits precisely on this question. The decision below conflicts with the decisions of other courts of appeals, both as to whether *Daubert* governs the admissibility of technical or specialized but non-scientific expert testimony under Rule 702, and, in particular, whether the standards of *Daubert* should apply to expert psychological testimony.

### A. There is a Conflict Among the Circuits About Whether Daubert Applies to Specialized or Other Non-Scientific Knowledge.

The First Circuit treated the testimony of Ann Burgess, the so-called "victimologist," not as scientific knowledge but as "other specialized knowledge" under Rule 702. App.16-17a. Accord-

ingly, the First Circuit looked solely to whether the expert's opinion would assist the trier of fact, but did not test the reliability or validity of the opinions she expressed, nor the underlying basis or knowledge for those opinions, as would have been required for scientific knowledge under *Daubert*. App. 16-17a; *Daubert*, 113 S.Ct. at 2796-7.

This decision is therefore directly in conflict with decisions of other courts of appeals that have applied this Court's decision in *Daubert* to "other specialized knowledge." For example, in *Berry v. City of Detroit*, 25 F.3d 1342, 1350 (6th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995), a case involving testimony over police department disciplinary procedures, the court acknowledged that *Daubert*, by its terms, applies only to scientific evidence. Nonetheless, because "evidentiary problems are exacerbated when courts must deal with the even more elusive concept of non-scientific expert testimony," the Sixth Circuit applied the standard and factors from *Daubert* to the non-scientific expert there. *Id.* at 1349.

Other courts of appeals have taken the same approach as the Sixth Circuit, applying the *Daubert* standard to non-scientific expert testimony. Thus, for example, in *United States v. Amador-Galvan*, 9 F.3d 1414, 1418 (9th Cir. 1993), the Court of Appeals for the Ninth Circuit applied *Daubert* to an expert testifying about the reliability of eyewitness testimony. Likewise, the Tenth Circuit utilized the *Daubert* analysis to reach "technical and other specialized knowledge" with respect to a fire chief's testimony about the cause of a fire, *see United States v. Markum*, 4 F.3d 891, 896 (10th Cir. 1993), and to technical evidence concerning a train crash. *See Robinson v. Missouri Pacific R.R.*, 16 F.3d 1083 (10th Cir. 1994).

Other circuits, like the First Circuit in the present case, have rejected the use of the *Daubert* factors outside the scientific context. Thus, in *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19, 25 (2d Cir. 1994), the Second Circuit held that *Daubert* was intended to prevent the use of "junk science," and thus did not apply to other sorts of experts, including the

construction litigation at issue there. The Second Circuit also declined to apply *Daubert* to expert testimony by an FBI agent about organized crime. *See United States v. Locascio*, 6 F.3d 924, 937-8 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1646 (1994). Likewise, in *Thomas v. Newton Int'l Enterprises*, 42 F.3d 1266, 1270 (9th Cir. 1994), the Ninth Circuit held that *Daubert* applies only to cases of scientific knowledge, not other specialized knowledge such as a longshore worker testifying about the working conditions of experienced longshore personnel.

Commentators too have recognized difficulties and confusion resulting from the issue left unresolved in *Daubert*, and have urged the Court to "develop general criteria for determining whether the evidence is reliable for the particular purpose for which it is offered." *Confronting the New Challenges of Scientific Evidence*, 108 Harv. L.R. 1481, 1526-7 (1995); *see* Diana K. Sheiness, *Out of the Twilight Zone: The Implications of Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 69 Wash. L. Rev. 481, 492 (1994). Rigorous review of the validity and reliability of expert evidence relying on specialized knowledge would protect, as *Daubert* was intended to do, against the admission of "junk" testimony and other expert evidence that is baseless, untestable, not subject to peer review, and not generally accepted in the relevant field.[6]

This Court should resolve the pervasive conflict among the courts of appeals regarding the applicability of the *Daubert*

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[6] As one commentator has noted:

> The least confusing and arbitrary way to deal with the classification issue would be to apply the same general standards of reliability and relevance to all types of expert testimony. There is no reason for an arbitrary classification to govern whether evidence relied on by the jury should be held to a lower standard of trustworthiness.

*Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1527 (1995).

standard of review to expert testimony relying on specialized or non-scientific knowledge.

### B. Clarification of When *Daubert* Applies is Particularly Important for the Type of Testimony Presented By the "Victimologist" in This Case.

Resolution of the issue of the lower federal courts' confusion over the applicability of *Daubert* to non-scientific or specialized knowledge is particularly important in cases such as this one where the expert testimony is rooted in psychology.

In addition to the general conflict about the application of *Daubert* to nonscientific testimony, there is also a specific conflict with respect to its application to psychological testimony. In *Wilson v. City of Chicago*, 6 F.3d 1233, 1238 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1844 (1994), for example, the Seventh Circuit applied *Daubert* to a pathologist who sought qualification as an expert regarding the effects of torture and held that his testimony was not admissible. Although he had studied the subject, including interviewing numerous victims, the court found that he "failed to show that he has the requisite medical or scientific knowledge to establish the effects of electroshock treatments on the human body or psyche. All he was in a position to attest was that [the victim's] description of the effects of electroshock was consistent with that given by other electroshock victims with whom [the expert] has talked — testimony that would not even draw on [his] medical expertise." *Id.* at 1239.

Other courts of appeals have, like the Seventh Circuit in *Wilson*, applied *Daubert*'s standards to psychological testimony and other types of "soft" science. *E.g.*, *United States v. Rincon*, 28 F.3d 921, 924 (9th Cir.), *cert. denied*, 115 S. Ct. 605 (1994) (psychological testimony regarding the reliability of eyewitness identification).

Commentators have recognized the importance of determining whether *Daubert* should apply to such testimony. *See*, *e.g.*, *Confronting the New Challenges of Scientific Evidence*, 108 Harv.

L. Rev. at 1526 ("It is unclear whether psychology should be classified as 'scientific' or as 'other specialized knowledge'") (footnote omitted); David O. Stewart, *A New Test*, 79 ABA Journal 48, 51 (November 1993) ("Indeed, will the *Daubert* analysis spill over from scientific experts to those offering expert opinion based on 'technical, or other specialized knowledge' under Rule 702? If so, *Daubert* could transform contests over the admissibility of expert psychological testimony on such subjects as rape trauma syndrome, post-traumatic stress disorder or the hazards of eyewitness identifications"); Lisa Askowitz and Michael Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027, 2097 (1994) ("'Scientific' evidence contemplated by the Court in *Daubert* is an explanative theory incorporating a process capable of being tested to produce error rates. Because this kind of testing is impossible in the field of child sexual abuse, *Daubert* does not control the admissibility of expert psychological testimony offered in child sexual abuse prosecutions").

This issue is an important one because of the wide extent to which this kind of psychology-based testimony is being used in courtrooms. In fact, social science research "is now almost always introduced as if it were simply an adjudicative fact - by expert testimony before a jury or judicial factfinder." John Monahan and Lauren Walker, *Judicial Use of Social Science Research after Daubert*, 2 Shepard's Expert and Scientific Evidence Q. 327, 339 (1994). As another commentator has observed, "[d]uring the last decade . . . a flood of nontraditional psychological evidence has inundated the courts in criminal cases. Several of these types of evidence are known as 'syndromes.' Examples include rape trauma syndrome, battered women (or wife) syndrome, and pathological gamblers' syndrome. . . . Other types of evidence are not denominated either 'syndrome' or 'profile' but are nonetheless nontraditional. Examples include diminished capacity, the psychology of child sexual abuse, the fallibility of eyewitness identification, psychological testimony regarding witness credibility, and other miscellaneous types of testimony." David McCord, *Syndromes, Profiles and Other*

*Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 Oregon L. Rev. 19, 24 (1987).

Guidance from this Court is essential to ensure that courts apply uniform standards to this area. Such clarification is particularly important in criminal cases where the issue arises with considerable frequency. *Daubert* addressed the issue of expert evidence in a civil context; this Court has yet to clarify the proper standard for reviewing expert testimony in the context of criminal litigation. *See Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. at 1529. Because of the unique factors present in criminal litigation -- the usual lack of defense resources to hire experts, the higher stakes involved, and the limited discovery rights of defendants relative to civil litigation -- stricter requirements for the rigorous testing of the validity and reliability of expert testimony are essential. *See id.*; Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L. Rev. 1345, 1352-4 (1994); Paul Giannelli, *"Junk Science": The Criminal Cases*, 84 J. Crim. L. & Criminology 105, 116 (1993); Andrea Moenssens, *Novel Scientific Evidence in Criminal Cases: Some Words of Caution*, 84 J. Crim. L. & Criminology 2, 4 (1993).

## II. IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

In addition to refusing to apply *Daubert*, the court below reviewed the district court's determination to permit Ms. Burgess to testify under an "abuse of discretion" standard rather than *de novo*. App. 16a. In deferring to the district court's discretion with respect to the decision to permit Ms. Burgess to testify, the First Circuit's decision raises a critical question concerning the proper standard of review. While some other circuits reviewing cases under *Daubert* have also used the deferential standard

adopted by the First Circuit, *e.g.*, *United States v. Dorsey*, 45 F.3d 809 (4th Cir.), *cert. denied*, 115 S. Ct. 2631 (1995); *United States v. Bonds*, 12 F.3d 540, 554 (6th Cir. 1993), the First Circuit's resolution of this issue is in sharp conflict with decisions of the Third, Seventh, and Ninth Circuits, which have held that such decisions must be reviewed *de novo*.[7] In *Bradley v. Brown*, 42 F.3d 434, 436 (7th Cir. 1994), while upholding the district court's exclusion of expert testimony, the court stated that "[w]e first undertake a *de novo* review of whether the district court properly followed the framework set forth in *Daubert*." Likewise, in *Claar v. Burlington Northern R.R.*, 29 F.3d 499, 500 (9th Cir. 1994), the Court of Appeals for the Ninth Circuit held that "[w]e review *de novo* the district court's interpretation of the Federal Rules of Evidence and will uphold its decision to exclude expert testimony unless it is 'manifestly erroneous.'" (citation omitted).

In *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3rd Cir. 1994), *cert. denied subnom. General Electric Co. v. Ingram*, 115 S. Ct. 1253 (1995), the Court of Appeals for the Third Circuit explained that the high level of deference to which evidentiary rulings are generally subject is not appropriate where expert testimony is concerned. Although the trial court has a superior vantage point to assess the evidence, evaluating the reliability of scientific methodologies and data does not generally involve assessing the truthfulness of the expert witnesses and thus is often not significantly more difficult for the Court of Appeals.

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[7] Significantly, under the old general acceptance test in *Frye v. United States*, 293 F. 1013 (1923), most courts reviewed the admission of expert evidence under a *de novo* standard because the determination of admissibility under *Frye* was deemed to be a question of law, not one of fact. *See* David L. Faigman, Elise Porter and Michael J. Saks, *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1821 (1994).

The proper standard of review for the admissibility of expert testimony arises frequently and the Circuits are widely divided. This issue also warrants this Court's review.

## III. THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT

In *United States v. Kozminski*, 487 U.S. 931, 939 (1988), this Court held that 18 U.S.C. § 1584 is violated only if there is a compulsion of services "by the use or threatened use of physical or legal coercion," and that "psychological coercion" is not enough. *Id.* at 948-49.

Here, since Ms. Gedara was not physically prevented from leaving the Alzankis' unlocked apartment, the First Circuit found the requisite physical or legal coercion solely in the threats of deportation to a friendly country made by Mr. Alzanki because App. 13-15a. The requirements were satisfied because Ms. Gedara "reasonably considered" deportation to Kuwait as "at least as severe as imprisonment, particularly when viewed in light of her 'special vulnerabilities.'" App. 14a. This conclusion is directly in conflict with the decision of the Court of Appeals for the Second Circuit in *United States v. Shackney*, 333 F.2d 475, 479 (2d Cir. 1964), where threats of deportation to another friendly country — Mexico — were found *not* to violate the statute.

In *Shackney*, the Second Circuit expressly rejected the claim that "because the statute can be satisfied by a credible threat of imprisonment, it should also be considered satisfied by a threat to have the employee sent back to the country of his origin, at least absent circumstances which would make such deportation equivalent to imprisonment or worse." 333 F.2d at 486.

This is because involuntary servitude does not exist "where the servant knows he has a choice between continued service and freedom, even if the master has led him to believe that the choice may entail consequences that are exceedingly bad." *Id.* at 486.

*See United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir.) (reminder by the employer that the consequences of leaving will be exceedingly bad, *e.g.* deportation, is not enough), *cert. denied*, 463 U.S. 1214 (1983). "While a credible threat of deportation may come close to the line, it still leaves the employee with a choice." *Shackney*, 333 F.2d at 486.[8]

In *Kozminski*, this Court created additional confusion as to when a threat of deportation can constitute legal coercion. It cited

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[8] Most convictions under the statute prohibiting a holding to involuntary servitude involve extreme physical coercion, consistent with the purpose of the precursor to 18 U.S.C. § 1584, which was "enacted [by Congress] pursuant to its constitutional authority to enforce the Thirteenth Amendment . . . ." *Kozminski*, 487 U.S. at 945. *See e.g.*, *United States v. King*, 840 F.2d 1276, 1280 (6th Cir. 1988) (violation of 18 U.S.C. § 1584 where religious sect repeatedly threatened and used physical force to coerce children to perform labor), *cert. denied*, *subnom. Lewis v. United States*, 488 U.S. 894 (1988); *United States v. Booker*, 655 F.2d 562, 563 (4th Cir. 1981) (violation of 18 U.S.C. § 1584 where owners of migrant farm used physical force to coerce labor and kidnapped workers when they attempted to leave); *Jobson v. Henne*, 355 F.2d 129, 131 (2d Cir. 1966) (violation of 18 U.S.C. § 1584 where patients in a mental institution were forced to perform labor); *Downs v. Department of Public Welfare*, 368 F. Supp. 454, 465 (E.D. Pa. 1973); *Santiago v. City of Philadelphia*, 435 F. Supp. 136, 156-7 (E.D. Pa. 1977). "Legal coercion" sufficient for a conviction under 18 U.S.C. § 1584 has been found only in *Clyatt v. United States*, 197 U.S. 207, 215 (1905) (where Court held that peonage constituted involuntary servitude); *United States v. Reynolds*, 235 U.S. 133, 146 (1914) (Court found criminal surety system constituted involuntary servitude where misdemeanant contracted to work in exchange for surety's promise to pay the owed fine and misdemeanant was subject to criminal penalties if he failed to fulfil the contract); *Pollock v. Williams*, 322 U.S. 4, 5 (1944) (Court held that subjecting debtors to criminal punishment for failing to perform services constituted involuntary servitude); *Bailey v. Alabama*, 219 U.S. 219 (1911) (where Court invalidated a criminal penalty for laborers who breached their employment contracts).

*Shackney* with approval, but stated in dicta that "it is possible that threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude." 487 U.S. 948. At the same time, this Court also stated that, in enacting 18 U.S.C. § 1584, "far from broadening the definition of involuntary servitude for immigrants, children, or mental incompetents," Congress "eliminated any special distinction among, or protection of, special classes of victims." *Id.*

This case thus raises important questions as to whether the threat of deportation alone can satisfy the compulsion requirement of *Kozminski*. It is incredible to believe that Congress believed that a threat to terminate employment resulting in deportation to a friendly country such as Kuwait or Mexico constitutes coercion within the meaning of the statute. This is particularly true where, as here, the threatened deportation in any event would be the natural result of ceasing employment. Given the large number of foreign nationals who are subject to deportation if they leave their employment in the United States, this case presents important and recurring questions concerning the scope of the involuntary servitude statute.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARC E. MILLER
*Counsel of Record*
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

*Counsel for Petitioner*

October 16, 1995

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

UNITED STATES,
Appellee

v.

TALAL H. ALZANKI,
Defendant, Appellant.

No. 94-1645
June 1, 1995, Decided

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS. Hon. Rya W. Zobel, U.S. District Judge.

JUDGES: Before Selya, Cyr and Stahl, Circuit Judges.

CYR, Circuit Judge.

Defendant Talal H. Alzanki appeals from a district court judgment convicting and sentencing him under 18 U.S.C. §§ 371 and 1584, for holding a household employee in involuntary servitude. We affirm.

## I

## BACKGROUND[1]

At the end of the Gulf War, Vasantha Katudeniye Gedara ("Gedara"), a native of Sri Lanka, was employed by appellant Talal Alzanki's family for a brief time as a domestic servant in their Kuwaiti residence. The Alzanki family prevented Gedara from leaving their residence, by retaining her passport and warning her that she would be subject to arrest and physical abuse by the Kuwaiti police should she venture outside. Gedara was

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[1] The facts are related in the light most favorable to the verdicts. *See United States v. Tejeda*, 974 F.2d, 212 (1st Cir. 1992).

informed that she soon would be sent to the United States to work for appellant Talal Alzanki and his wife, Abair, at a monthly salary of $250, which was reduced to $120 before she departed Kuwait.

Immediately upon her arrival at appellant's apartment in Quincy, Massachusetts, on August 28, 1992, Gedara's passport was confiscated by appellant, who told her that she was not to leave the apartment alone. She was not permitted to use the telephone or the mails, speak with anyone other than the Alzankis, nor even to venture onto the balcony or look out the apartment windows. Appellant told Gedara that the American police, as well as the neighbors, would shoot undocumented aliens who ventured out alone.

During the four months she remained in the apartment, Gedara was assaulted twice. On one occasion, when Gedara asked that the volume be turned down on the television while she was trying to sleep, appellant grabbed and threw her bodily against the wall. On another occasion, Abair Alzanki slapped Gedara and spat in her face when she failed to turn off a monitor.

The Alzankis deliberately risked Gedara's health by compelling her to work fifteen hours a day at hard, repetitive tasks. She was required to clean the apartment on a constant basis with caustic and noxious chemicals, without the benefit of respiratory protection, and her requests for rubber gloves were refused. Later, after the noxious fumes caused Gedara to faint, fall, and injure her ribs, the Alzankis withheld medical treatment. They also refused to let Gedara have dental treatment for an abscessed tooth.

Finally, though affluent, the Alzankis denied Gedara adequate food, which resulted in serious symptoms of malnourishment, including enlarged abdomen, massive hair loss, and cessation of menstrual cycles. She was provided with only two housecoats to wear and allowed to sleep and sit only on the floor. Once,after Gedara accidentally broke a humidifier, the Alzankis threatened to withhold all her wages.

In addition to the physical abuse and inhumane treatment, Gedara was threatened — on almost a daily basis — with deportation, death or serious harm should she disobey the Alzankis' orders. On numerous occasions, the Alzankis threatened to deport her to Kuwait, and not allow her to return to Sri Lanka. Appellant threatened to kill her if the Alzankis' newborn child — suffering from spina bifida — were to die while appellant was away in New York. The climate of fear was enhanced by Gedara's witnessing one incident involving Talal Alzanki's physical abuse of Abair, and by learning from Abair that he had struck Abair again shortly thereafter. On another occasion, Abair Alzanki threatened to sew up Gedara's mouth with a needle and thread, and throw her into the ocean.

On December 17, 1992, after confiding her plight to nurses who came to the apartment to care for the Alzankis' sick child, Gedara fled the apartment and reported her ordeal to the local police. Appellant later complained to the police that Gedara should be returned, because she "belonged to him" and "he had a contract for her."

A federal grand jury returned a two-count indictment, charging the Alzankis with conspiring to hold, and holding, Gedara in involuntary servitude, in violation of 18 U.S.C. §§ 371 and 1584. At trial, the Alzankis testified in their own behalf; Gedara testified for the prosecution. Due to a medical emergency, a mistrial was declared as to Abair Alzanki, prior to her cross-examination. The government nonetheless agreed to permit her direct testimony to remain in evidence. The jury returned guilty verdicts against Talal Alzanki on both counts. The district court sentenced him to one year and one day, which represented a downward departure from the 18-to-24 month guideline sentencing range, and to a modest restitutionary sentence.

## II

## DISCUSSION

Appellant challenges certain jury instructions; the sufficiency of the evidence supporting both convictions; various evidentiary

rulings; the government's closing argument; and the $13,403.00 restitutionary sentence imposed by the district court.

**A. The Scope of the Involuntary Servitude Statute**

Section 1584 proscribes involuntary servitude.[2] It is not to be read so narrowly as to pose Thirteenth Amendment problems. *United States v. Kozminski*, 487 U.S. 931, 945, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (1988) ("Congress' use of the constitutional language in a statute enacted pursuant to its constitutional authority to enforce the Thirteenth Amendment guarantee makes the conclusion that Congress intended the phrase to have the same meaning in both places logical, if not inevitable. In the absence of any contrary indications, we therefore give effect to congressional intent by construing 'involuntary servitude' in a way consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment."); *see also United States v. Booker*, 655 F.2d 562, 564-65 (4th Cir. 1981); *United States v. Shackney*, 333 F.2d 475, 481-86 (2d Cir. 1964).[3] The government need not prove physical restraint. *See,*

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[2] At the time of the offense, the statute provided:

> Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1584 (1992).

[3] Most peonage and involuntary servitude cases in recent years have involved migrant agricultural workers. See, e.g., *Kozminski*, 487 U.S. 931, 108 S. Ct. 2751, 101 L. Ed. 2d 788 (dairy farm workers); *United States v. Harris*, 701 F.2d 1095, 1098 (4th Cir. 1982) (migrant truck-farm workers), *cert. denied*, 463 U.S. 1214, 103 S. Ct. 3554, 77 L.Ed 2d 1400 (1983); *Booker*, 655 F.2d 562 (migrant farm-labor camp); *United States v. Bibbs*, 564 F.2d 1165, 1167 (5th Cir. 1977) (fruit harvesting crews), *cert. denied*, 435 U.S. 1007, 98 S.Ct. 1877, 56 L.Ed 2d 388 (1978); *Shackney*, 333 F.2d 475 (chicken-farm workers).

*e.g.*, *United States v. King*, 840 F.2d 1276, 1278-79 (6th Cir. 1988) (upholding cult leaders' convictions for holding occupants in involuntary servitude, despite absence of fencing or other physical barriers); *United States v. Warren*, 772 F.2d 827, 827-33, (11th Cir. 1985) (upholding involuntary servitude conviction even though victim had opportunity to escape), *cert. denied*, 475 U.S. 1022, 106 S. Ct. 1214, 89 L. Ed.2d 326 (1986); *United States v. Bibbs*, 564 F.2d 1165, 1167 (5th Cir.) (recognizing that various forms of physical *force* and/or *threats* of violence may establish requisite coercion), *cert. denied*, 435 U.S. 1007, 98 S. Ct. 1877, 56 L. Ed.2d 388 (1978).

Absent proof of physical restraint, a finding of involuntary servitude is not warranted, however, unless the government establishes that the victim could only extricate herself by risking "imprisonment or worse." *Shackney*, 333 F.2d at 486. Thus, compulsion is an essential element of involuntary servitude under section 1584. *See Flood v. Kuhn*, 316 F. Supp. 271, 281 (S.D.N.Y. 1970), *aff'd*, 443 F.2d 264 (2d Cir. 1971), *aff'd*, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed.2d 728 (1972). In sum, the requisite compulsion under section 1584 obtains when an individual, through an actual or threatened use of physical or legal coercion, intentionally causes the oppressed person reasonably to believe, given her "special vulnerabilities," that she has no alternative but to remain in involuntary service for a time. *See Kozminski*, 487 U.S. at 952-53, 108 S. Ct. at 2764-65; *United States v. Mussry*, 726 F.2d 1448, 1451-52 (9th Cir.), *cert. denied*, *Singman v. United States*, 469 U.S. 855, 105 S. Ct. 180, 83 L. Ed. 2d 114 (1984).

A sustainable conviction under section 1584 therefore requires sufficient evidence to enable a finding, *inter alia*, that the defendant used or threatened physical restraint, bodily harm *or* legal coercion. *Kozminski*, 487 U.S.at 952, 108 S. Ct. at 2765 ("*This definition encompasses those cases in which the defendant holds the victim in servitude by placing the victim in fear of such physical restraint or injury or legal coercion.*") (emphasis added). Moreover, in assessing whether the government has succeeded in establishing the requisite compulsion, the jury is to consider the

victim's "special vulnerabilities," with a view to "whether the physical or legal coercion or threats thereof could plausibly have compelled the victim to serve [against her will]." *Id.*[4] In other words, conviction under section 1584 is precluded absent proof, *inter alia*, that the victim was intentionally held in service against her will (i) by actual physical restraint or physical force or (ii) by legal coercion or (iii) by plausible threats of physical harm or legal coercion.

**B. Jury Instructions**

We review the challenged jury instructions against the backdrop of the entire charge, *see United States v. Tutiven*, 40 F.3d 1, 8 (1st Cir. 1994) (citing *United States v. Serino*, 835 F.2d 924, 930 (1st Cir. 1987)), *cert. denied*, __ U.S. __, 115 S. Ct. 1391, 131 L. Ed.2d 243 (1995), focusing our inquiry on whether the instructions adequately explained the law or "'whether they tended to confuse or mislead the jury on the controlling issues.'" *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 353 (1st Cir. 1989) (citation omitted), *cert. denied*, 496 U.S. 937, 110 S. Ct. 3217, 110 L. Ed.2d 664 (1990).

**1. The Instruction on Involuntary Servitude**

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[4] The *Kozminski* Court elaborated on the evidentiary role of the victim's "special vulnerabilities":

> [A] child who is told he can go home late at night in the dark through a strange area may be subject to physical coercion that results in his staying, although a competent adult plainly would not be. Similarly, it is possible that threatening an incompetent with institutionalization or an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude.

487 U.S. at 948, 108 S.Ct. at 2762-63.

Appellant asserts three challenges to the jury instruction defining the substantive offense of involuntary servitude. First, he argues that the court misled the jury into believing that psychological pressure alone could establish the requisite element of compulsion, by defining "physical force" as encompassing "the notion of compulsion, coercion, power, violence." The district court's instruction stated:

> [T]he government has to prove that the defendant held Ms. Gedara in involuntary servitude by using or threatening physical force, or using or threatening legal coercion.
>
> Physical force includes restraint, physical restraint, locking somebody up, or in some other way restraining the person. It includes physically injuring the person. It includes the notion of compulsion, coercion, *power*, violence. And the government has to prove that the defendant held or participated in holding Ms. Gedara by using physical force, or by threatening to use physical force.

(Emphasis added.) Appellant theorizes that the jury may have misinterpreted the term "power," in light of the expert testimony proffered by the government, *see infra* Section II.D.1, that "an unequal power relationship is where there is a subordinate and a dominant person. It is generally defined by the authority person, and it is unequal because of that authority relationship that exists between the two parties."

The argument is without merit. The challenged instruction, viewed against the backdrop of the entire charge, *see Tutiven*, 40 F.3d at 8, left no doubt whatever that psychological pressure alone would not satisfy the "force or threat" element of the involuntary servitude offense.[5]

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[5] In the final jury charge, the trial judge provided unmistakably clear guidance against any such misunderstanding: "But [Talal Alzanki] *cannot be convicted* if you find he used only psychological means to compel her, if he played mind games with her. *That's not enough*. The government does have to prove that he used . . . or threatened physical

Second, appellant claims that the district court failed to instruct the jury that any fear engendered in Gedara must be shown to have been "reasonable." But, in fact, the court instructed the jury to decide "whether the service was involuntary[] [and] whether Ms. Gedara *reasonably believed* that she had no choice except to remain in the service of the Alzankis." The district court's references to subjective considerations, such as "whether [Gedara] was personally in fear of physical or other means of coercion," occurred in the course of its discussion of the types of *evidence* the jury could weigh in deciding whether Gedara's *belief* — that she had no other choice — *was reasonable*. *See also infra* note 6. The trial judge assuredly did not suggest that a mere finding that Gedara harbored fears — however unreasonably — was enough to establish compulsion under section 1584. It was entirely proper to instruct the jury to consider Gedara's background and experience in assessing whether her fears were reasonable.[6]

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or legal coercion."

Moreover, the preliminary jury instructions explained: "Now, involuntary servitude . . . means a condition of servitude in which the victim is forced to work for the defendant by the *use or threat of physical restraint or physical injury or by the use or threat of coercion through law or legal process*."

[6] Similarly, appellant suggests that the jury instruction invited the impression that "extremely poor working conditions and/or special vulnerabilities of the servant" might serve as a proxy for actual or threatened use of physical force or legal coercion. However, the trial judge correctly instructed the jury that

> [the charged offense, involuntary servitude,] encompasses situations in which one person holds another in servitude by placing that person in fear of such physical restraint or injury or legal coercion. It may be shown by evidence of extremely poor working conditions and/or special vulnerabilities of the servant.

In addition, the jury received proper instructions on the roles of "legal coercion" and "physical coercion":

The final instructional challenge relates to an uncertified transcript of the jury charge — containing a clerical error — made available to the jury during its deliberations. The transcript mistakenly stated: "The government does *not* have to prove that [Alzanki] used, . . . or threatened physical or legal coercion." Thus, there can be no question that the transcript misstated an essential element of the crime charged.

The jury had been deliberating for seven hours by the time it requested the transcript *for the explicit purpose of reviewing witness testimony*.[7] Thus, there is but a remote possibility that the jury *even consulted the portion of the transcript containing the typographical error*. Furthermore, even assuming the jury consulted the relevant portion of the transcript, it is virtually inconceivable that it would have credited this lone typographical error over four correctly transcribed statements, and the five correct oral statements it had been given in the courtroom earlier, especially since the transcript itself alerted the jury with the imprint: "Rough Draft-Not Certified." *Cf. United States v. DeMasi*, 40 F.3d 1306, 1317-1318 (1st Cir. 1994) ("Our review of the instructions reveals that the district court referred to the 'beyond a reasonable doubt' standard no less than twelve times in the nine pages of jury instructions preceding the isolated section challenged here. This overwhelming number of correct references negated any chance that the contested statements were

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[Legal coercion] simply means the use of the law, the legal process, or legal institutions to compel service. The question here that you will need to determine is: Did the government prove beyond a reasonable doubt that the defendant used or threatened physical or legal coercion to compel Ms. Gedara's service in the household?

Of course, the jury is presumed to have followed the instructions. *Tutiven*, 40 F.3d at 7 (citing *Yates v. Evatt*, 500 U.S. 391, 403-04, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991)).

[7] Despite the government's recommendation that the transcript be proofread, the defense suggested that it be submitted to the jury prior to proofreading or certification by the court reporter.

misconstrued by the jury as somehow reducing the government's burden of proof"), *cert. denied*, *Bonasia v. United States*, __ U.S. __, 115 S. Ct.947, 130 L. Ed. 2d 890 (1995); *United States v. Glenn*, 828 F.2d 855, 861 (1st Cir. 1987) ("This [challenged] phrase [in the jury instructions] . . . 'may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'") (quoting *United States v. DeVincent*, 632 F.2d 147, 152 (1st Cir.), *cert. denied*, 449 U.S. 986, 101 S. Ct. 405, 66 L. Ed. 2d 249 (1980)).[8]

Given the fact that the trial judge correctly and repeatedly explained this element to the jury earlier in the courtroom, and absent any indication that the jury even noted, let alone credited, the isolated misstatement in the transcript, we find no prejudice. *Cf. United States v. Griley*, 814 F.2d 967, 975 (4th Cir. 1987) (where deliberating jury received tape recording of jury instructions at defendant's criminal trial, as well as instructions given in unrelated civil case, conviction upheld on grounds that appellant failed to demonstrate prejudice and trial court gave proper curative instruction); *United States v. North*, 746 F.2d 627, 631-32 (9th Cir.) (affirming conviction even though a search warrant affidavit, excluded from evidence, was sent to jury room by mistake; finding "no reasonable possibility that [the warrant] could have affected the verdict"), *cert. denied*, 470 U.S. 1058, 105 S. Ct. 1773, 84 L. Ed. 2d 832 (1984), *overruled on other grounds, Jacobson v. United States*, 503 U.S. 540, 112 S. Ct. 1535, 118 L. Ed. 2d 174 (1992). There was no reversible error.

**2. The Conspiracy Instruction**

Appellant claims that the district court incorrectly instructed the jury on an essential element of the conspiracy charge, by stating that he could be found guilty even if his only alleged coconspirator, Abair Alzanki, involuntarily cooperated under duress. Apparently unclear on this point, the jury later requested

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[8] The "force or threat" element was described correctly in the preliminary jury instructions as well. *See supra* note 5.

further instructions: "Is there a conspiracy if the second person [the wife] . . . joined the agreement not voluntarily but in fear?" The trial judge instructed:

> The answer is yes. If she agreed with him to do an act that is unlawful, the first element, an agreement, is satisfied. You must, however, then go on and consider the second element, and determine whether [the husband, Talal Alzanki], the only person who is a defendant before you, joined into that agreement knowingly and willfully as I have defined it to you.

Appellant correctly asserts that a viable conspiracy charge under 18 U.S.C. § 371 requires at least two conspirators, each possessed of the requisite criminal intent. *See, e.g., United States v. Penagaricano-Soler*, 911 F.2d 833, 841 (1st Cir. 1990). He argues that his wife could not have been the indispensable *second* willing party, because he coerced her into participating. For the latter proposition, he relies on cases which hold that a conspiracy charge will not lie if the putative coconspirator turned out to be an undercover law enforcement agent. *See, e.g., United States v. Nason*, 9 F.3d 155, 161 & n.2 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1331, 127 L. Ed. 2d 678 (1994).

As the present claim is raised for the first time on appeal, we review only for plain error. *DeMasi*, 40 F.3d at 1318; *United States v. Griffin*, 818 F.2d 97, 100 (1st Cir.), *cert. denied*, 484 U.S. 844, 108 S. Ct. 137, 98 L. Ed. 2d 94 (1987). The burden therefore rests with appellant to establish that the error was "clear," in the sense that it was "obvious," that it affected "substantial rights," and that failure to vacate the conspiracy conviction would result in a "miscarriage of justice." *United States v. Olano*, __ U.S. __, __ — __, 113 S. Ct. 1770, 1776-79, 123 L. Ed. 2d 508 (1993).

We note at the outset that a "generalized fear" of harm would not have afforded Abair Alzanki a viable defense to the conspiracy charge. *See, e.g., United States v. Stevens*, 985 F.2d 1175, 1182 (2d Cir. 1993) (district court properly rejected request to instruct jury that generalized fear of harm, without more, would compel acquittal). Moreover, neither defendant contended

at trial that Abair Alzanki conformed her will or behavior in response to duress. Indeed, nothing in the trial record intimates a causal link between Talal Alzanki's abusive behavior and Abair's participation in the conspiracy. *Cf. Slater v. United States*, 562 F.2d 58, 62 (1st Cir. 1976) (defendant convicted of Kickback Act violation, an essential element of which is the intimidation of others, was properly convicted as well of *conspiring* with those whom he intimidated). Thus, the district court correctly advised the jury that the appropriate inquiry was whether *Talal* Alzanki "joined . . . that agreement knowingly and willfully." As the evidence plainly supported such a finding, there was no error, let alone plain error.

### C. *Sufficiency of the Evidence*

Appellant next contends that the evidence was insufficient to convict on the substantive "involuntary servitude" charge. We review "the evidence in the light most favorable to the verdict, in order to determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. All reasonable inferences are drawn in favor of the verdict and any credibility determination must be compatible with the judgment of conviction." *United States v.Tuesta-Toro*, 29 F.3d 771, 776 (1st Cir. 1994) (quoting *United States v. Tejeda*, 974 F.2d 210, 212 (1st Cir. 1992)), *cert. denied*, __ U.S. __, 115 S. Ct. 947, 130 L. Ed. 2d 890 (1995). There was ample evidence to enable a rational jury to find, beyond a reasonable doubt, each essential element of the substantive offense.

Appellant argues that the record discloses only a few isolated instances in which any physical force whatever was used against Gedara. These incidents, he argues, did not approach, either in frequency or severity, *but see supra* p.3, the level of physical abuse present in the typical involuntary servitude case. Furthermore, he says, conditions in the Alzanki apartment were neither squalid nor jail-like; whereas in the typical involuntary servitude case, the victim is exposed to severe physical abuse, as well as confinement in extremely uncomfortable quarters. *See, e.g., United States v. Kozminski*, 821 F.2d 1186, 1188-89 (6th

Cir. 1987) (squalid lodgings, without plumbing; rotten food; numerous instances of slapping, choking, kicking), *aff'd*, 487 U.S. 931 (1988); *United States v. Harris*, 701 F.2d 1095, 1098 (4th Cir. 1982) (beatings with a rubber hose and confinement to quarters ("the jail") in retaliation for attempted escape), *cert. denied*, 463 U.S. 1214, 103 S. Ct. 3554, 77 L. Ed. 2d 1400 (1983); *Booker*, 655 F.2d at 565-66 (numerous retaliatory beatings following escape attempts); *Bibbs*, 564 F.2d at 1167 (holding victims at gunpoint; beating and threatening to kill any who attempted escape).

Gedara testified that during her four-month ordeal in their apartment she was physically assaulted by the Alzankis on two occasions and contemporaneously informed that their purpose was to keep her "in her place." The physical violence appellant directed at Gedara was by no means trifling in degree. The evidence revealed that appellant punished Gedara — merely for asking him to turn down the television — by throwing her bodily against the wall. Moreover, she was kept in a serious state of malnutrition, deprived of medical care, and subjected to threats of deportation, physical harm and even death. Given her experience as a domestic servant in Kuwait, *see supra* p.2,[9] and in the Alzanki apartment in Quincy, the jury was entitled to infer that Gedara reasonably believed these threats.

Appellant correctly asserts that the requisite "compulsion" is not established in circumstances where an available alternative to continued service is merely "exceedingly bad." *See Kozminski*,

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[9] Gedara testified to her understanding of Kuwaiti police practices toward household servants:

> Q. Ms. Gedara, what was your state of mind regarding the police in Kuwait?
>
> A. I heard if we go alone out in the street, they're going to catch us and hit [us] and put into jail.

She testified that she believed that the American police would treat her much the same way were she to venture outside the Alzanki apartment.

487 U.S. at 938 (quoting *Shackney*, 333 F.2d at 486). Instead, the evidence must establish that the victim reasonably believed she was left with no alternative to continued servitude that was not the equivalent of "imprisonment or worse." *Shackney*, 333 F.2d at 486. *See, e.g., Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 1000 (3d Cir.) (community service requirement for high school graduation not a form of involuntary servitude, as student has choice of foregoing graduation) (citing *Shackney*, 333 F.2d at 486), *cert. denied*, __ U.S. __, 114 S. Ct. 85, 126 L. Ed. 2d 53 (1993).

The evidence that Gedara herself was well aware of the severely restrictive conditions encountered by household servants in Kuwait would enable the jury rationally to conclude that Gedara — threatened with deportation to Kuwait and no prospect of returning to Sri Lanka and her family — confronted an alternative to continued involuntary service which she reasonably considered at least as severe as imprisonment, particularly when viewed in light of her "special vulnerabilities."[10] Moreover, the reasonableness of her fear of deportation was substantiated by the undisputed evidence that she would become deportable immediately upon loss of her "B-1" visa status, which allowed her lawfully to remain in the United States only while in the employ of the Alzankis. See 8 U.S.C. § 1184(a)(1) ("Upon failure to maintain the status under which she was admitted, . . .

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[10] Evidence of other threats and warnings provided further support for the verdict. These included warnings that the American police would shoot Gedara if she left the apartment alone. Though such a prospect might not have seemed credible to a competent adult American, the "special vulnerabilities" of the victim must be taken into consideration. *See Kozminski*, 487 U.S. at 948, 956, 108 S. Ct. at 2762, 2766. To a foreign worker familiar with Kuwaiti customs and practices (for example, at trial there was evidence that Kuwaiti soldiers manned checkpoints to enforce restrictions on noncitizen movement, especially household servants), a threat of deportation in these circumstances plausibly may equate with imprisonment. *See supra* note 9.

such alien will depart from the United States."); 22 C.F.R. § 41.31.

Although the defense presented contrary testimony, the jury fairly could infer that the most efficacious threats are those the victim reasonably believes can be carried out. *Shackney*, 333 F.2d at 486-87. *Cf. Booker*, 655 F.2d 562 (threats, substantiated by severe beatings and assaults with firearms, coerced abductees into remaining at labor camp). The jury was entitled to make its own credibility determinations, *Tuesta-Toro*, 29 F.3d at 776, and to find, beyond a reasonable doubt, that Gedara believed appellant's deportation threats to be plausible and that the alternative to continued involuntary servitude was at least as severe as imprisonment.

**D. Evidentiary Rulings**

**1. The "victimologist" testimony**

Appellant filed an unsuccessful motion *in limine* to preclude the government from calling Ann Burgess, a "victimologist," as an expert witness. At trial, the government used Burgess to refute the Alzankis' principal "defense"; *viz.*, that Gedara often ventured outside their *unlocked* apartment during her alleged involuntary servitude, and given the normal human instinct for self-preservation, one would expect an unrestrained person faced with actual or threatened physical abuse to flee from her abuser at the first opportunity. Burgess countered this evidence with testimony that abuse victims often harbor the opposite impulse — overwhelmed by fear they remain with their abusers.

Appellant contends that Burgess's expert qualifications related only to sexual abuse victimology, not the behavioral responses of domestic workers subjected to involuntary servitude. Thus, appellant argues, the expert testimony presented by Burgess was irrelevant and unhelpful to the jury, *see* Fed. R. Evid. 104(a), 702 (permitting use of expert testimony "if scientific, technical, or other specialized knowledge will assist the trier of fact") or, at the very least, its minimal probative value was substantially outweighed by the danger of unfair prejudice, *see* Fed. R. Evid.

403. Finally, appellant argues that the jury was swayed by Burgess's professional credentials, and her testimony amounted to impermissible "bolstering" of the allegations of abuse made by Gedara.

We review challenges to expert-witness qualification only for manifest abuse of discretion. *See, e.g., United States v. Sepulveda*, 15 F.3d 1161, 1183 (1st Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 2714, 129 L. Ed. 2d 840 (1994); *United States v. Echeverri*, 982 F.2d 675, 677 (1st Cir. 1993).[11] The "gatekeeping function" contemplated by Rule 702 essentially requires the trial judge to assess whether it is "*reasonably likely* general that the expert possesses specialized knowledge which will assist the trier better to understand a fact in issue." *Sepulveda*, 15 F.3d at 1183 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, __ U.S. __, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)) (emphasis added); *Apostol v. United States*, 838 F.2d 595, 599 (1st Cir. 1988) (noting that Rule 702 rulings invite a "case-specific inquiry"). We find no error.

The central fallacy in appellant's claim is its implicit assumption that no one other than an "involuntary servitude" victimologist could have qualified as an expert under Rule 702 in the present case. This thesis obviously focuses *only* on the "specialized knowledge" requirement under Rule 702, to the total *exclusion* of the *ultimate* standard for admission whether the "specialized knowledge" possessed by the witness "will *assist* the trier of fact to understand the evidence or to determine a fact in issue . . . ." Fed. R. Evid. 702. It is one matter to acknowledge that a witness steeped in the behavioral reactions of Sri Lankan

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[11] We reject the government's contention that the Rule 702 claim should be reviewed only for plain error, since only Abair Alzanki objected at trial. *See United States v. Reed*, 977 F.2d 14, 16 (1st Cir. 1992) (motion in limine must be "renewed" by timely objection at trial). At the outset, the trial judge announced that an objection by either defendant would preserve the claim for both. *See, e.g., Sepulveda*, 15 F.3d at 1180 (noting practice as common protocol).

domestic servants abused by Kuwaiti nationals in the United States could be instructive (if not inordinately so) to a jury. It is quite another to suggest that it is not "reasonably likely," *see Echeverri*, 982 F.2d at 677, that a somewhat less specialized victimologist might "assist" a generalist fact finder in assessing evidence of the exceedingly uncommon phenomenon of domestic servant abuse in the present-day United States. *Id.* at 783 (Rule 702 demands "common sense inquiry"). While the more generalized nature of the proffered testimony may temper its probative value to the fact finder, we do not think it can be said that its relevance is negated entirely.[12]

The record reflects that the trial judge carefully evaluated Ms. Burgess's professional qualifications following a lengthy voir dire. Burgess testified that her principal training and experience related to victims of sexual abuse, but that she had researched comparable clinical behavior manifested by victims of physical abuse of a non-sexual nature in so-called "unequal power" relationships (*e.g.*, battered spouses and children). Based on her general research and her personal interaction with hundreds of victims of sexual abuse, Burgess testified that Gedara's behavioral response to the non-sexual abuse administered by the Alzankis *was consistent with the behavior of abuse victims generally*. It seems to us that expert testimony on this subject — which the defense was free to contradict — was "reasonably likely" to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, somewhat technical, and beyond the realm of acquired knowledge normally possessed by lay jurors.

Finally, appellant cites no federal case law for the contention that allowing an expert to testify to her empirical findings on the behavioral reactions of abuse victims impermissibly suggests to

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[12] The rationale for the trial judge's ruling was much the same:

> It seems . . . that one doesn't have to be so specialized as to be an expert on the response of a slavery victim to the master rather than a victim of other kinds of abuse of power in unequal relationships.

the jury that the putative victim's allegations of abuse should be believed. The overwhelming weight of authority suggests otherwise. *See, e.g., United States v. Hadley*, 918 F.2d 848, 852 (9th Cir. 1990) (upholding admission of expert testimony by child psychiatrist as to "general behavior characteristics that may be exhibited in children who have been sexually abused"), *cert. dismissed*, __ U.S. __, 113 S. Ct. 486, 121 L. Ed. 2d 324 (1992); *Server v. Mizell*, 902 F.2d 611, 615 (7th Cir. 1990); *United States v. Pierre*, 812 F.2d 417, 419 (8th Cir. 1987). Moreover, the able trial judge left no room for doubting that the jury remained perfectly free to reject Burgess's expert opinion, as well as its predicate assumption.[13]

**2. "Other Acts" Evidence (Rule 404(b))**

Appellant next contends that the district court erred in admitting Gedara's testimony concerning appellant's abusive behavior toward his wife, Abair Alzanki, because Rule 404(b) absolutely bars "other acts" evidence relevant only to prove criminal propensity or bad character. *See Tuesta-Toro*, 29 F.3d at 775. We disagree.

The Rule 404(b) bar is not implicated unless the challenged "other crimes, wrongs, or acts are relevant *exclusively* to instigate an inference that the defendant is more likely to have acted in similar fashion by committing the offense for which he is on trial." *Tutiven*, 40 F.3d at 5 (emphasis added). By contrast, the

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[13] The judge firmly cautioned the jury immediately before Burgess testified:

> The witness who is about to testify is what we call an expert witness. She does not know what occurred at the Alzanki household. She wasn't there, she didn't see any of that. . . . [O]ne of the ways in which witnesses are very often examined, expert witnesses are very often examined, is that they are asked to make certain assumptions . . . that have to do with the facts in the case. . .[I]f the facts are different from the assumptions, then the opinions based on the *assumption are of absolutely no value to you.*

evidence admitted below bore special relevance to a pivotal element of the alleged offense quite apart from appellant's propensity to commit wrongful acts; *viz.*, the "reasonableness" of Gedara's stated fear that she would be a target of appellant's physical violence should she disobey him. *See United States v. Oreto*, 37 F.3d 739, 749 (1st Cir. 1994) (evidence of victim's awareness of defendant's prior bad acts against third parties is especially relevant to an element of the offense, i.e., the reasonableness of the stated basis for the victim's fear) (citing *United States v. DeVincent*, 546 F.2d 452, 456-57 (1st Cir. 1976), *cert. denied*, 431 U.S. 903, 97 S. Ct. 1694, 52 L. Ed. 2d 387 (1977)), *cert. denied*, __ U.S. __, 115 S. Ct. 1161, 130 L. Ed. 2d 1116 (1995).

**3. Evidence of Ethnic Background and National Origin**

Appellant now claims that the government deliberately introduced evidence of repressive Kuwaiti customs and practices toward domestic workers primarily to inflame any ethnic bias among the jurors.[14] Since he asserted no contemporaneous objection, we review for plain error. *See United States v. Figueroa*, 976 F.2d 1446, 1455 (1st Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1346, 122 L. Ed. 2d 728 (1993) (finding claim of ethnic bias waived, and no plain error). We will reverse "only if the error 'seriously affect[ed] the fundamental fairness and basic integrity of the proceedings.'" *Tuesta-Toro*, 29 F.3d at 775 (citing *United States v. Carty*, 993 F.2d 1005, 1012 n.9 (1st Cir. 1993)). We find no error.

The government itself cautioned the jury during closing argument that appellant's mere status as a foreign national should play no part in their deliberations. Further, at no point during the trial did the government make any inflammatory remark relating to the Alzankis' ethnic background or national origin. *See United*

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[14] During jury impanelment, the trial judge scrupulously inquired of each prospective juror whether the ethnic background or national origin of the defendants would affect the juror's capacity to serve impartially. Certain prospective jurors were excused for cause on these grounds.

*States v. Ovalle-Marquez*, 36 F.3d 212, 221-22 (1st Cir. 1994) (finding remarks not inflammatory because, *inter alia*, they "serve [a] purpose other than to inflame"), *cert. denied*, __ U.S. __, 115 S. Ct. 1322, 131 L. Ed 2d 202 (1995). Finally, unlike cases in which evidence of this type has been found marginally relevant at best, *see, e.g.*, *United States v. Rodriguez Cortes*, 949 F.2d 532, 541-42 (1st Cir. 1991) (finding that admission of defendant's Colombian identification card impermissibly invited jury to conclude that "a person . . . born in Colombia . . . must be involved in drug trafficking"); *see also United States v. Doe*, 903 F.2d 16, 18 (D.C. Cir. 1990) (noting that prosecutor frequently referred to defendants as Jamaicans and stressed expert testimony to the effect that "Jamaicans" were known to be deeply involved in drug trafficking), prevailing Kuwaiti customs were highly probative on at least three issues material to the section 1584 prosecution. *See, e.g.*, *Figueroa*, 976 F.2d at 1455 (no plain error where evidence related to true source of large bank deposits in defendant's name, corroborated certain admissions by defendant, and bolstered credibility of important government witness whose credibility was challenged by defense).

First, it could be inferred that Gedara — as a former domestic servant in Kuwait — developed a "special vulnerability" to the Alzankis' threats, even though an American domestic worker might not have been placed "reasonably" in fear thereby. *See Kozminski*, 487 U.S. at 952, 108 S. Ct. at 2765. For example, the evidence relating to Kuwaiti customs and practices clearly tended to buttress the reasonableness of Gedara's stated belief in appellant's warnings that the American police, like their Kuwaiti counterparts, were under orders to shoot undocumented domestic workers who ventured out alone. Gedara likewise would have been especially vulnerable to the coercive force of appellant's frequent threats to punish her disobedience by *returning her to Kuwait*, rather than to her native home in Sri Lanka. Moreover, appellant's own familiarity with Kuwaiti customs could generate the reasonable inference that appellant played on Gedara's isolation and vulnerabilities, making it more probable that he acted with the requisite *specific intent* to subject her to involuntary

servitude. Indeed, appellant sought to capitalize on the very same evidence by arguing to the jury that he should not be convicted since his experiences growing up in Kuwait had never put him on fair notice that his treatment of Gedara might be considered criminal in other cultures.

**4. Hearsay Testimony**

Appellant next challenges, as inadmissible hearsay, the testimony given by several nurses and a respiratory specialist who came to the Alzankis' apartment to care for their ailing child, and by a police officer who interviewed Gedara immediately after she fled the apartment. These witnesses related various contemporaneous statements Gedara made to them concerning the harsh conditions and inhumane treatment she experienced at the hands of the Alzankis. The government offered their testimony under Rule 801(d)(1)(B) (prior consistent statements offered to rebut charge of recent fabrication). The district court admitted their testimony under Rule 803(3) (statements of declarant's then-existing state of mind). We review for abuse of discretion. *United States v. Paulino*, 13 F.3d 20, 24 (1st Cir. 1994).

Some of the challenged testimony clearly was admissible under Rule 803(3), such as Gedara's contemporaneous statements as to her state of mind that she was afraid, hungry, exhausted. On the other hand, Rule 803(3) has been held not to allow more expansive statements elaborating upon the underlying reasons for the declarant's state of mind. *See, e.g., United States v. Fontenot*, 14 F.3d 1364, 1371 (9th Cir.), *cert. denied*, __ U.S. __, 115 S. Ct. 431, 130 L. Ed. 2d 343 (1994); *United States v. Cohen*, 631 F.2d 1223, 1225 (5th Cir. 1980). In any event, we may affirm the district court ruling on any ground apparent from the appellate record. *United States v. Norton*, 26 F.3d 240, 244 (1st Cir. 1994).

The government was entitled to introduce the challenged testimony to establish the truth of the matter asserted, if (1) the declarant (*viz.*, Gedara) testified at trial and was subject to cross-examination; (2) the challenged statements and her trial testimony were consistent; and (3) the challenged statements were

offered to rebut an express or implied charge that the declarant recently fabricated her story, or became subject to some improper influence or motive to falsify after making the challenged statement. *See Tome v. United States*, __ U.S. __, 115 S. Ct. 696, 130 L. Ed. 2d 574 (1995); *United States v. Arias-Santana*, 964 F.2d 1262, 1264 (1st Cir. 1992); *United States v. Piva*, 870 F.2d 753, 758 (1st Cir. 1989). All three criteria for admission under Rule 801(d)(1)(B) were met.

At trial, Gedara testified consistently with her previous statements to the nurses, therapist, and police officer. By suggesting, on cross-examination, that Gedara recently had met with a Hollywood producer interested in purchasing the film rights to her "story," that she was engaged in a Hollywood bidding war, and that she had been interviewed by Boston newspapers to drum up publicity for her "story," defense counsel plainly impugned Gedara's motives and just as clearly invited the government to respond — as it did — with corroborative evidence that Gedara had made statements consistent with her trial testimony long before the motivations attributed to her by the defense had ever arisen. *See United States v. Montague*, 958 F.2d 1094, 1095 (D.C. Cir. 1992).

**E. The Restitutionary Sentence**

Finally, appellant contends that the restitutionary sentence imposed pursuant to the Victim and Witness Protection Act, 18 U.S.C. § 3663(b)(2)(A), constituted error because it reimbursed Gedara for (1) lost overtime wages to which she was not entitled under the applicable law, see Fair Labor Standards Act, 29 U.S.C. § 213; Massachusetts Wage and Hour Act, Mass. Gen. L. Ann. ch. 151; (2) lost wages for time she took off from her job to assist the government in prosecuting its case against the Alzankis, *but see Ratliff v. United States*, 999 F.2d 1023, 1026 (6th Cir. 1993); and (3) psychological counseling for chronic stress symptoms attributable to her abusive treatment, *but cf.* 18 U.S.C. § 3663(b)(2)(A) (restitution only for "*bodily* injury").

We decline to address appellant's challenges to the restitutionary sentence since these claims were never raised below. *See*

*United States v. Dietz*, 950 F.2d 50, 55 (1st Cir. 1991).[15] Appellant's utter failure to object disabled the sentencing court from making a reasoned assessment of the present claims in the first instance, and from making the predicate factual findings upon which the claims depend. For example, as concerns appellant's second claim, the government responds that the restitutionary sentence did *not* include reimbursement to offset leave time Gedara took to help the government prepare its case, but merely to reimburse her for lost wages occasioned by having to leave her new employment to obtain treatment for the debilitating stress she experienced during her four-month ordeal. The government concedes that reimbursement for Gedara's assistance in preparing for trial would be problematic as a matter of law, but appellant's failure to alert the district court to the claim, raised for the first time on appeal, prevented the sentencing court from clarifying the *factual* basis for its restitutionary sentence. Lastly, appellant's only attempt at addressing the government's waiver argument — that he promptly appealed the restitutionary sentence — is no answer at all. Nor did he request reconsideration of the restitutionary sentence. *See* Fed. R. Crim. P. 35(c); *cf. United States v. Heilprin*, 910 F.2d 471, 474 n.5 (7th Cir. 1990).

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[15] Indeed, as concerns the first contention, appellant flatly stated at sentencing that he *would leave it up to the Court to determine what is an appropriate restitution figure*. Nor did he cite to the two statutes upon which he now relies. Rather, he left the district court with the clear impression that some overtime wages might be appropriate as a matter of law.

## III

## CONCLUSION

The district court judgment must be affirmed.

*Affirmed.*

**UNITED STATES COURT OF APPEALS**
**FOR THE FIRST CIRCUIT**

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No. 94-1645

UNITED STATES,
Appellee,

v.

TALAL H. ALZANKI,
Defendant, Appellant.

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**JUDGMENT**

Entered: June 1, 1995

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: **The judgment of the district court is affirmed.**

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
Case Number: 1:93CR10309-001

Michael Collora, Esq., Defendant's Attorney

UNITED STATES OF AMERICA

v.

Talal Alzanki

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____

which (was) (were) accepted by the court.

[X] was found guilty on count(s) **1 & 2**

after a plea of not guilty.

| | | |
|---|---|---|
| **Title & Section:** | 18:371 | 18:1584; 18:2 |
| **Nature of Offense:** | Conspiracy | Involuntary Servitude; Aiding and Abetting |
| **Date Offense Concluded:** | 12/17/92 | 12/17/92 |
| **Count Numbers:** | 1 | 2 |

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

_____

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 017-76-1713

Defendant's Date of Birth: 10/3/63

Defendant's USM No.: 19836-038

Defendant's Mailing Address:
100 Marina Bay Drive, Apt. 301
Quincy, MA 02111

Defendant's Residence Address:
100 Marina Bay Drive, Apt. 301
Quincy, MA 02111

May 31, 1994
Date of Imposition of Judgment

Signature of Judicial Officer

Rya W. Zobel
U.S. District Judge
Name & Title of Judicial Officer

6/2/94
Date

**IMPRISONMENT**

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of one year and one day.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] at _____a.m./p.m. on _____.

[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] be 2 p.m. on _____.

[X] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant deliver on _____ to _____

at _____, with a certified copy of this judgment.

_____

UNITED STATES MARSHAL

By_____

Deputy Marshal

## SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.

While on supervised release, the defendant shall not illegally possess a controlled substance.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or else where and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

| Count | Assessment | Fine | Restitution |
|---|---|---|---|
| 1,2 | $ 50.00 | | $13,403.00 |
| **Totals** | $100.00 | | $13,403.00 |

## FINE

No fines have been imposed in this case.

## RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

| Name of Payee | Amount of Restitution | Priority Order of Payment |
|---|---|---|
| Vasantha Gedara | $13,403.00 | |

Each restitution payment shall be divided proportionately among the payees named unless specified in the priority payment column above.

## SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[ ] in full immediately.

[ ] in full not later than _____

[ ] in monthly installments of $ _____ over a period of _____ to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period in incarceration.

[ ] in installments to commence 30 days after the date of this judgment. If his judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule provided that the entire financial penalty is paid no later than the termination of supervision but in no event no later than 5 years after release from incarceration.

[X] in installments as set out by the Chief, U.S. Probation Department.

[ ] The defendant shall pay the costs of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

## STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary): the adjustment of two levels upward under 3A1.1 is inappropriate as the offense necessarily implies a vulnerable victim.

**Guideline Range Determined by the Court:**

Total Offense Level: 15

Criminal History Category: I

Imprisonment Range: 18 to 24 months

Supervised Release Range: 2 to 3 years

Fine Range: $5,000 to $50,000

☐ Fine is waived or is below the guideline range, because of the defendant's inability to pay.

Restitution: $13,403

☐ Full restitution is not ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

☐ The sentence is within the guidelines range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

The sentence departs from the guideline range

☐ upon motion of the government, as a result of defendant's substantial assistance.

☒ for the following reason(s):
The defendant's unusual and severe family situation including the child's medical needs.

Supreme Court, U.S.
FILED
JAN 22 1996
CLERK

(2)

No. 95-619

# In the Supreme Court of the United States

OCTOBER TERM, 1995

TALAL H. ALZANKI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
*Solicitor General*

DEVAL L. PATRICK
*Assistant Attorney General*

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether the district court erred in admitting expert testimony.

2. Whether the court of appeals erred in reviewing the district court's decision to admit expert testimony under an abuse-of-discretion standard.

3. Whether there was sufficient evidence of actual or threatened physical or legal coercion to convict petitioner of holding a person in involuntary servitude, in violation of 18 U.S.C. 1584.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinion below | 1 |
| Jurisdiction | 1 |
| Statement | 1 |
| Argument | 5 |
| Conclusion | 12 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bradley* v. *Brown*, 42 F.3d 434 (7th Cir. 1994) | 8, 9 |
| *Claar* v. *Burlington Northern R.R.*, 29 F.3d 499 (9th Cir. 1994) | 8-9 |
| *Daubert* v. *Merrell Dow Pharmaceuticals*, 43 F.3d 1311 (9th Cir.), cert. denied, 116 S. Ct. 189 (1995) | 9 |
| *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) | 5, 6 |
| *Hamling* v. *United States*, 418 U.S. 87 (1974) | 8 |
| *Jackson* v. *Virginia*, 443 U.S. 307 (1979) | 11 |
| *Paoli R.R. Yard PCB Litigation, In re*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995) | 8 |
| *Patel* v. *Gayes*, 984 F.2d 214 (7th Cir. 1993) | 9 |
| *Salem* v. *United States Lines Co.*, 370 U.S. 31 (1962) | 8 |
| *United States* v. *Anderson*, 61 F.3d 1290 (7th Cir.), cert. denied, 116 S. Ct. 543 (1995) | 9 |
| *United States* v. *Harris*, 701 F.2d 1095 (4th Cir.), cert. denied, 463 U.S. 1214 (1983) | 11 |
| *United States* v. *Kozminski*, 487 U.S. 931 (1988) | 3, 11 |
| *United States* v. *Nobles*, 422 U.S. 225 (1975) | 7, 8 |
| *United States* v. *Quintero*, 21 F.3d 885 (9th Cir. 1994) | 9 |
| *United States* v. *Rahm*, 993 F.2d 1405 (9th Cir. 1993) | 9 |

Cases—Continued: Page

*United States* v. *Shackney*, 333 F.2d 475 (2d Cir. Cir. 1964) ..... 9, 10

Statutes and rule:

18 U.S.C. 371 ..... 2, 3
18 U.S.C. 1584 ..... 2, 3, 10, 11
Fed. R. Evid. 702 ..... 4, 7

# In the Supreme Court of the United States

OCTOBER TERM, 1995

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NO. 95-619

TALAL H. ALZANKI, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 54 F.3d 994.

### JURISDICTION

The judgment of the court of appeals was entered on June 1, 1995. Pet. App. 25a. Justice Souter granted petitioner's motion to extend the time for filing a petition for writ of certiorari to and including October 16, 1995, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of conspiring to hold a person in

involuntary servitude, in violation of 18 U.S.C. 371, and of holding a person in involuntary servitude, in violation of 18 U.S.C. 1584. Petitioner was sentenced to a term of imprisonment of one year and one day, and was ordered to pay $13,403 in restitution. The court of appeals affirmed.

1. Petitioner's family employed Vasantha Katudeniye Gedara, a native of Sri Lanka, for a brief time as a domestic servant in Kuwait. The family prevented Gedara from leaving the residence by retaining her passport and warning her that she would be subject to arrest and physical abuse by the Kuwaiti police if she ventured outside. Pet. App. 1a, 13a n.9.

Gedara was then sent to the United States to work for petitioner and his wife, Abair Alzanki. Immediately upon Gedara's arrival at the Alzankis' apartment in Massachusetts, petitioner confiscated her passport and forbade her to leave the residence alone. The Alzankis prohibited Gedara from using the telephone or the mails, speaking with persons other than the Alzankis, venturing onto the balcony, or even looking out of the apartment windows. Petitioner told Gedara that the American police, as well as the neighbors, would shoot undocumented aliens who ventured out alone. Pet. App. 2a; see also *id.* at 13a n.9, 20a.

During a four-month period, petitioner and his wife threatened Gedara almost daily "with deportation, death or serious harm should she disobey [their] orders." Pet. App. 3a. They told her that if she were deported, she would have to return to Kuwait and could not go back to her family in Sri Lanka. *Ibid.* The Alzankis also subjected Gedara to "physical abuse and inhuman treatment." *Ibid.* They physically assaulted her, withheld medical treatment when

she was injured, and deprived her of adequate food. *Id.* at 2a. The denial of food caused Gedara to experience serious symptoms of malnutrition, including an enlarged abdomen, massive hair loss, and cessation of her menstrual cycle. *Ibid.*

Gedara eventually complained about the abuse to nurses who visited the residence to care for the Alzankis' child. The nurses notified local authorities, who escorted Gedara from the Alzanki residence. Pet. App. 3a.

2. A federal grand jury returned a two-count indictment charging petitioner and his wife with conspiring to hold, and knowingly and willfully holding, Gedara in involuntary servitude, in violation of 18 U.S.C. 371 and 1584, respectively. Pet. App. 3a. Because of a medical emergency, the district court declared a mistrial as to petitioner's wife. *Ibid.* A jury returned guilty verdicts against petitioner on both counts of the indictment. *Ibid.*

3. The court of appeals affirmed. The court rejected petitioner's contention that the evidence was insufficient to support his conviction under 18 U.S.C. 1584. Relying on *United States* v. *Kozminski*, 487 U.S. 931 (1988), the court explained that, although the government need not show that the victim was physically restrained, a conviction under Section 1584 requires proof that the defendant intentionally held the victim in service against her will by "actual or threatened use of physical or legal coercion." Pet. App. 5a; see also *id.* at 6a. The court found that petitioner and his wife had subjected Gedara to such legal and physical coercion, including frequent threats of "deportation, death or serious harm should she disobey the Alzankis' orders" (*id.* at 3a; see also *id.* at 13a), and physical assaults designed to keep

Gedara "in her place." *Id.* at 13a. The court also emphasized petitioner's inhumane treatment of Gedara, including the "serious state of malnutrition," that Gedara suffered at the hands of petitioner and his wife. *Ibid.*

With regard to the threats of deportation, the court concluded that Gedara reasonably considered the consequences of a return to Kuwait to be "at least as severe as imprisonment." Pet. App. 14a. Several factors led the court to that conclusion. Kuwait was not Gedara's country of origin and the Alzankis had warned her that they would not allow her to return to her family in Sri Lanka. *Id.* at 3a, 20a. Gedara was familiar with the Kuwaiti practice of stationing soldiers at checkpoints to enforce restrictions on the movements of noncitizens, especially household servants. *Id.* at 14a n.10. She also had been told that Kuwaiti police beat and imprisoned foreign household servants who ventured out alone. *Id.* at 13a n.9, 20a. The court added that other "threats and warnings" supported the conviction, including petitioner's warning that the American police would shoot Gedara if she left the apartment alone. *Id.* at 14a n.10; see also *id.* at 20a.

The court of appeals further held that the district court had not abused its discretion in admitting expert testimony under Rule 702 of the Federal Rules of Evidence.[1] The expert, Ann Burgess, testified that

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[1] Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

victims of abuse are often so overwhelmed by fear that they remain with their abusers instead of fleeing at the first opportunity. Petitioner argued on appeal that the expert's testimony was irrelevant and unduly prejudicial because, he asserted, the expert's specialty was the behavior of victims of sexual abuse, rather than the reactions of domestic workers subject to involuntary servitude. Pet. App. 15a. The court of appeals rejected that argument, observing that Burgess had conducted research regarding victim behavior in a range of abusive situations involving unequal power relationships. The court concluded that "expert testimony on this subject—which the defense was free to contradict—was 'reasonably likely' to assist the jury in understanding and assessing the evidence, in that the matter at issue was highly material, somewhat technical, and beyond the realm of acquired knowledge normally possessed by lay jurors." *Id.* at 17a. The court also rejected petitioner's argument that Burgess's testimony impermissibly bolstered Gedara's allegations. The court observed that the district judge had cautioned the jury that Burgess did not observe the events in the Alzanki household and, as a consequence, had no firsthand knowledge of what had occurred there. *Id.* at 17a-18a & n.13.[2]

## ARGUMENT

1. Petitioner contends (Pet. 7-11) that the court of appeals adopted a restrictive reading of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), that conflicts with the decisions of other

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[2] Petitioner challenged his conviction on several other grounds, none of which are raised in the petition.

circuits. According to petitioner, the court of appeals held that *Daubert*'s admissibility criteria[3] do not apply to the psychological testimony at issue in this case or to non-scientific expert testimony in general. Petitioner is mistaken.

The court of appeals in this case did not hold that the criteria for the admission of expert testimony articulated in *Daubert* are inapplicable to psychological or non-scientific expert testimony. Indeed, the court cited *Daubert*, among other cases, for the proposition that trial judges have a duty to evaluate expert testimony proffered under Rule 702. See Pet. App. 16a (discussing trial court's "gatekeeping function" under Rule 702). Moreover, in addressing petitioner's challenges to the expert's testimony, the court found that the trial judge evaluated the relevance and reliability of that testimony (Pet. App. 17a), as required by this Court's decision in *Daubert*, 113 S. Ct. at 2795. Petitioner suggests (Pet. 8-9) that the court of appeals should have expressly discussed each of the *Daubert* factors in deciding whether the expert's testimony was admissible. The absence of

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[3] In *Daubert*, this Court articulated four factors to guide trial judges in determining whether proffered evidence is "scientifically valid" and thus qualifies as "scientific knowledge" under Rule 702. Those factors, which were not intended as a "definitive checklist or test," 113 S. Ct. at 2796, are (1) whether a theory or technique can be, or has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error in using a particular technique and the existence and maintenance of standards controlling the technique's operation; and (4) whether a particular theory or technique has gained "general acceptance" within the relevant scientific community. *Id.* at 2796-2797.

such explicit analysis in the court's opinion can hardly be interpreted as a holding that the *Daubert* analysis is inapplicable to the type of testimony here. The court in this case simply had no reason to discuss the *Daubert* factors expressly in its opinion because they were not the focus of petitioner's arguments on appeal. See Pet. App. 15a-18a.[4] Accordingly, the question of the applicability of the *Daubert* analysis to psychological and other "non-scientific" expert testimony was neither presented to nor squarely addressed by the court of appeals in this case.

The court of appeals correctly affirmed the district court's determination that Burgess's testimony was "highly material" (Pet. App. 17a), was reasonably likely to assist the jury in understanding the issues, and would not impermissibly bolster the victim's credibility. *Id.* at 16a-18a. Petitioner has provided no reason to doubt the correctness of that ruling and, in any event, the fact-bound application of Rule 702 to the circumstances of this case does not warrant review by this Court. See *United States* v. *Nobles*, 422 U.S. 225, 241-242 n.16 (1975).

2. Petitioner next contends (Pet. 13-15) that the court of appeals erred in reviewing the district court's admission of expert testimony pursuant to Rule 702 for an abuse of discretion. That argument lacks merit. This Court has repeatedly recognized that trial judges have broad discretion to admit or

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[4] The United States did not challenge the applicability of the *Daubert* analysis to this case in the court of appeals. Rather, the government asserted in its brief in that court that the role of a district judge in screening proffered expert testimony "remains essentially the same" under *Daubert* regardless of whether the evidence is characterized as "scientific" material or other specialized knowledge. Gov't C.A. Br. 19-20 n.9.

exclude expert testimony, and that such evidentiary rulings will not be overturned absent an abuse of discretion. See, *e.g.*, *United States* v. *Nobles*, 422 U.S. at 241-242 n.16; *Hamling* v. *United States*, 418 U.S. 87, 108 (1974); *Salem* v. *United States Lines Co.*, 370 U.S. 31, 35 (1962). Nothing in this Court's *Daubert* decision casts doubt on the continuing applicability of that deferential standard of review.

Contrary to petitioner's contention (Pet. 13-15), the decision in this case is consistent with the rule applied in the Third, Seventh, and Ninth Circuits. Citing *In Re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), cert. denied, 115 S. Ct. 1253 (1995), petitioner argues that the Third Circuit has applied *de novo* review "where expert testimony is concerned." Pet. 14. *Paoli*, however, held merely that, when a trial court's *exclusion* of scientific opinion testimony results in a summary judgment or directed verdict, the reviewing court "will give [the ruling] a 'hard look' * * * to determine if a district court has *abused its discretion* in *excluding* evidence as unreliable." 35 F.3d at 750 (emphasis added; citation omitted). *Paoli* thus reaffirms the applicability of the abuse-of-discretion standard to the present context.[5]

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[5] Although the court in *Paoli* suggested that its abuse-of-discretion review would be more exacting than usual where exclusion of expert testimony had precipitated summary judgment, that approach would not be applicable in the present case because the district judge admitted—rather than excluded—the challenged expert testimony. The court in *Paoli* emphasized that its "hard look" approach was justified because the Federal Rules of Evidence "display a preference for admissibility." *Paoli*, 35 F.3d at 750.

Similarly, the decisions in *Bradley* v. *Brown*, 42 F.3d 434 (7th Cir. 1994), and *Claar* v. *Burlington Northern R.R.*, 29 F.3d 499 (9th Cir. 1994), cited by petitioner (Pet. 14), merely restate the well established rule that a district court's construction of the Federal Rules of Evidence is a question of law subject to *de novo* review, while a trial judge's ruling as to the admissibility of particular evidence under that construction is entitled to substantial deference and should be upheld unless "manifestly erroneous," see *Bradley* v. *Brown*, 42 F.3d at 436-437; *Claar* v. *Burlington Northern R.R.*, 29 F.3d at 500-501—a standard that is essentially equivalent to abuse-of-discretion review. See, *e.g.*, *Patel* v. *Gayes*, 984 F.2d 214, 217 (7th Cir. 1993) (treating "manifestly erroneous" and "abuse of discretion" standards as synonymous); *United States* v. *Quintero*, 21 F.3d 885, 893 (9th Cir. 1994) (same); *United States* v. *Rahm*, 993 F.2d 1405, 1410 (9th Cir. 1993) (same). Subsequent decisions by the Seventh and Ninth Circuits, moreover, have confirmed that the abuse-of-discretion standard is the appropriate one for reviewing the admissibility of expert testimony under Rule 702. See, *e.g.*, *United States* v. *Anderson*, 61 F.3d 1290, 1297 (7th Cir.), cert. denied, 116 S. Ct. 543 (1995); *Daubert* v. *Merrell Dow Pharmaceuticals*, 43 F.3d 1311, 1315 (9th Cir.), cert. denied, 116 S. Ct. 189 (1995). There is no circuit conflict regarding the standard of review of evidentiary decisions under Rule 702.

3. Finally, petitioner asserts (Pet. 15-17) that the court of appeals' decision that the evidence was sufficient to support his convictions conflicts with *United States* v. *Shackney*, 333 F.2d 475 (2d Cir. 1964). Petitioner contends that the court of appeals found the requisite physical or legal coercion to have been

established in this case "solely in the threats of deportation to a friendly country" (Pet. 15), and that the decision therefore conflicts with *Shackney*, which overturned a conviction under 18 U.S.C. 1584 that rested exclusively on threats of deportation to the employees' home country of Mexico. There is no conflict with *Shackney*.

Contrary to petitioner's contention, and in contrast to *Shackney*, the court of appeals in this case did not base its holding solely on petitioner's threat to have Gedara deported to Kuwait. In the present case, the court of appeals explained that petitioner's conviction was further supported by substantial evidence of "other threats and warnings" (Pet. App. 14a n.10), including petitioner's threat to Gedara that the police would shoot her if she left the apartment alone. Moreover, in reviewing the evidence supporting petitioner's convictions, the court highlighted other physical coercion and mistreatment, including petitioner's assaults against Gedara and the serious malnutrition she suffered as a result of petitioner's actions. *Id.* at 13a-14a; see also *id.* at 3a ("In addition to the physical abuse and inhumane treatment, Gedara was threatened—on almost a daily basis—with deportation, death or serious harm should she disobey the Alzankis' orders.").

Even if the court of appeals had relied solely on the deportation threat, its decision would not conflict with *Shackney*. The defendant in *Shackney* threatened to have the alleged victims deported to Mexico, their country of origin. 333 F.2d at 477, 486. The court reversed the defendant's conviction under Section 1584, rejecting the proposition that "the statute can be satisfied * * * by a threat to have the employee sent back to the country of his origin, at

least absent circumstances which would make such deportation equivalent to imprisonment or worse." *Ibid.* The threats at issue in *Shackney* are clearly distinguishable from petitioner's threat to have Gedara sent to Kuwait (which was not her country of origin) and, thereby, to prevent her from returning to her family in Sri Lanka. Gedara believed that if she were sent back to Kuwait she would be subject to imprisonment and beatings if she tried to leave. Pet. App. 13a n.9 & 14a. The court of appeals thus concluded that, under such circumstances, Gedara could reasonably have believed that deportation to Kuwait would produce consequences "at least as severe as imprisonment." Pet. App. 14a.[6] In any event, as this Court observed in *Kozminski*, "threatening * * * an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude." 487 U.S. at 948.

Viewing the evidence in the light most favorable to the government, see *Jackson* v. *Virginia*, 443 U.S. 307, 319, (1979), the court of appeals correctly held that a rational trier of fact could have concluded beyond a reasonable doubt that Gedara was "forced to

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[6] Nor is there any conflict between the court of appeals' decision in this case and *United States* v. *Harris*, 701 F.2d 1095 (4th Cir.), cert. denied, 463 U.S. 1214 (1983) (cited at Pet. 16). The *Harris* court stated in *dicta* that "a mere reminder by the employer that the consequences of leaving will be exceedingly bad (*e.g.*, deportation) is not enough [to support a Section 1584 conviction]." 701 F.2d at 1100. The *Harris* case itself did not involve threats of deportation, nor does the decision in that case cast doubt on the validity of a Section 1584 conviction where, as here, the defendant combined threatened and actual violence with the threat of deportation to a country other than the victim's nation of origin.

work for [petitioner] by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." *Kozminski*, 487 U.S. at 952. See Pet. App. 12a-15a. That holding does not warrant further review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
*Solicitor General*

DEVAL L. PATRICK
*Assistant Attorney General*

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
*Attorneys*

JANUARY 1996

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(3)

No. 95-619

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1995

TALAL H. ALZANKI,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For A Writ of Certiorari To The United States Court of Appeals For The First Circuit**

## REPLY FOR PETITIONER

MARC E. MILLER
(Counsel of Record)
MCLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

*Counsel for Petitioner*

11 pp

## TABLE OF CONTENTS


| | | Page |
|---|---|---|
| TABLE OF AUTHORITIES | | ii |
| I. | THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICABILITY OF THE *DAUBERT* STANDARD | 1 |
| II. | IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS | 3 |
| III. | THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT | 5 |
| CONCLUSION | | 7 |

## TABLE OF AUTHORITIES


**Cases** **Page**

*Carroll v. Morgan*, 17 F.3d 787 (5th Cir. 1994) . . . . . 5
*Cella v. United States*, 998 F.2d 418 (7th Cir. 1993) . . . . . 4
*Cook v. American S.S. Co.*, 53 F.3d 733 (6th Cir. 1995) . . . . . 4
*Daubert v. Merrell Dow Pharmaceutical*, 113 S. Ct. 2786 (1993) . . . . . 1, 2
*Daubert v. Merrell Dow Pharmaceutical, Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S.Ct. 89 (1995) . . . . . 5
*Hamling v. United States*, 418 U.S. 87 (1974) . . . . . 4
*Mars v. United States*, 25 F.3d 1383 (7th Cir. 1994) . . . . 4
*In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3rd Cir. 1994), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S. Ct. 1253 (1995) . . . 4
*Petruzzis IGA Supermarket, Inc. v. Darling-Delaware Company*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993) . . . . . 2
*Salem v. United States Lines Co.*, 370 U.S. 31 (1962) . . . . 4
*United States v. Anderson*, 61 F.3d 1290 (7th Cir.), *cert. denied*, 116 S.Ct. 543 (1995) . . . . . 4
*United States v. Arevalo-Gamboa*, No. 94-50236, 1995 U.S. App. LEXIS 31275 (9th Cir. Oct. 24, 1995) . . . . . 1
*United States v. Kozminski*, 487 U.S. 931 (1988) . . . . . 5
*United States v. Nobles*, 422 U.S. 225 (1975) . . . . . 3, 4
*United States v. Powers*, 59 F.3d 1460 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-6391) . . . . . 4
*United States v. Rice*, 52 F.3d 843 (10th Cir. 1995) . . . . . 5
*United States v. Sepulveda*, 15 F.3d 1161 (1st Cir 1993), *cert. denied*, 114 S.Ct. 2714 (1994) . . . . . 3
*United States v. Shackney*, 333 F.2d 475 (2d Cir. 1964) . . . . . 5, 6
*United States v. Sinclair*, No. 94-3716, 1996 U.S. App. LEXIS 306 (7th Cir. Jan. 10, 1996) . . . . . 1

## TABLE OF AUTHORITIES (Cont'd)

**Page**

*United States v. Thomas*, No. 95-1102, 1996 U.S. App. LEXIS 422 (6th Cir. Jan. 16, 1996) . . . . . 1, 4
*United States v. Velasquez*, 64 F.3d 844 (3rd Cir. 1995) . . . 1
*Watkins v. Schriver*, 52 F.3d 769 (8th Cir. 1995) . . . . . 5

**Statutes**

18 U.S.C. § 1584 . . . . . 5

## REPLY

### I. THE DECISION BELOW DIRECTLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS REGARDING THE APPLICABILITY OF THE *DAUBERT* STANDARD.

In its opposition, the government does not dispute that there is a split among the circuits about whether the reliability standard for the admissibility of scientific evidence established in *Daubert v. Merrell Dow Pharmaceutical*, 113 S.Ct. 2786 (1993), also applies to other expert testimony, including that characterized as "specialized" knowledge. Decisions of the Third, Sixth, Seventh and Ninth Circuits rendered after the filing of the Petition continue to evidence a growing split among the circuits on this issue.[1] The government makes no attempt to suggest that the prompt resolution of this conflict is not important, and indeed, could not do so.

Instead, the government contends that this case does not present that issue. The government asserts that the Court of Appeals "did not hold that the criteria for the admission of expert testimony articulated in *Daubert* are inapplicable to psychological or non-scientific expert testimony" (Opp. 6), and that, as evidence of this, the First Circuit had even "cited" *Daubert*. The government's reading of the First Circuit opinion is untenable, and confuses the relevance inquiry required by *Daubert* with the separate reliability inquiry that *Daubert* mandates. *Daubert* requires that a trial judge determine both whether the evidence is *relevant* (*i.e.*, whether it will assist the trier of fact) and whether

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[1] *See United States v. Thomas*, No. 95-1102, 1996 U.S. App. LEXIS 422, *12 (6th Cir. Jan. 16, 1996) (holding that the relevance and reliability standards in *Daubert* apply to "all expert testimony offered under rule 702."); *United States v. Sinclair*, No. 94-3715, 1996 U.S. App. LEXIS 306, *9 (7th Cir. Oct. 24, 1996) (holding *Daubert* applies only to scientific expertise); *United States v. Arevalo-Gamboa*, No. 94-50236, 1995 U.S. App. LEXIS 31275, *7 (9th Cir. 1995) (same); *United States v. Velasquez*, 64 F.3d 844, 850 (3rd Cir. 1995) (acknowledging confusion among the courts and applying *Daubert* to specialized knowledge).

it is *reliable*.[2] There is nothing to suggest that either the trial judge or the Court of Appeals here applied *Daubert*'s reliability analysis to the "victimologist" testimony offered as expert evidence in this case.

Although Petitioner urged that *Daubert* required a reliability inquiry,[3] the First Circuit never examined the various factors suggested in *Daubert* to test the reliability of expert testimony. No review was made of the "victimologist's" underlying reasoning, her methodology, the error rate in her field, whether her theories and conclusions were subject to peer review, or whether her theories and conclusions were gen-erally accepted in the psychological community. The opinion makes it clear that the First Circuit upheld the admission of the testimony solely on the basis of whether the evidence would assist the trier of fact, *i.e.*, whether it was relevant. *See* Pet. 16a (Court of Appeals stated that the "*ultimate* standard for admission" was whether the "'specialized knowledge' possessed by the witness [would] '*assist* the trier of fact'").

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[2] 113 S.Ct. at 2796. To determine whether expert evidence is reliable, the Court in *Daubert* suggested four factors which could be considered: (1) whether the theory or technique can or has been tested; (2) whether the theory or technique has been subjected to peer review; (3) what the known or potential error rate is for the technique or theory; and (4) whether it has been generally accepted in the expert's community. 113 S.Ct. at 2796-97.

[3] Contrary to the government's suggestion (Opp. 7), Petitioner directly raised the issue of *Daubert*'s reliability requirement at the appellate level. Citing *Petruzzi's IGA Supermarket, Inc. v. Darling-Delaware Company*, 998 F.2d 1224, 1238 (3d Cir.), *cert. denied*, 114 S.Ct. 554 (1993) and *Daubert*, 113 S.Ct. at 2795-2699, Petitioner argued on appeal that the "victimologist's" testimony must be *reliable*, and her theories generally accepted in her particular field, for it to be admissible. (App. Br. 20). Petitioner also raised specific issues of reliability, such as Ms. Burgess' admission that she had never participated in any study in the field of involuntary confinement, thereby challenging the basis for her opinions and conclusions. (App. Br. 21).

The government's assertion that the First Circuit "cited" *Daubert* (Opp. 6) is both inaccurate and irrelevant. The First Circuit cited to *United States v. Sepulveda*, 15 F.3d 1161 (1st Cir. 1993), *cert. denied*, 114 S.Ct. 2714 (1994), which cited *Daubert* for the proposition that the trial judge must examine relevance, *i.e.*, perform a "gatekeeping function" requiring assessment of "whether it is '*reasonably likely* [ ] that the expert possesses specialized knowledge which will assist the trier better to understand a fact in issue." (Pet. 16a). That is the only reference in the First Circuit's opinion to *Daubert*. Indeed, the Court below cited no case involving scientific evidence or the test of reliability under *Daubert*, nor did it even *refer* to reliability.

Finally, the government, relying on *United States v. Nobles*, 422 U.S. 225, 241-2 n.16 (1975), claims that the "fact-bound application of rule 702 to the circumstances of this case does not warrant review by this Court." (Opp. 8). But this case warrants this Court's review precisely because the First Circuit did not render a fact-bound decision but instead declined to apply the proper standard. The First Circuit did not address the reliability question at all. The courts of appeal are in conflict as to whether the proper application of Rule 702 to non-scientific experts requires the application of this Court's reliability standards in *Daubert*.

## II. IN HOLDING THAT THE DISTRICT COURT'S DECISION TO ADMIT EXPERT TESTIMONY WAS REVERSIBLE ONLY FOR ABUSE OF DISCRETION, THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

With respect to the second issue presented, the government apparently agrees that the First Circuit applied an abuse of discretion standard of review in this case, but argues that such a standard of review is the appropriate one for cases involving the admission of expert testimony, and that there is no conflict among the circuits about the proper standard.

Again the government confuses the question of reliability with the question of relevancy.[4] To be sure, the courts of appeals generally review relevancy determinations under an abuse of discretion standard. But the courts of appeals are divided on the question whether reliability determinations are reviewable under that same standard or under a stricter standard of review.

The Sixth Circuit quite clearly holds that reliability determinations under *Daubert* are to be reviewed *de novo*. *Cook v. American S.S. Co.*, 53 F.3d 733, 738 (6th Cir. 1995); *United States v. Thomas*, No. 95-1102 1996 U.S. App. LEXIS 422, *15 (6th Cir. Jan. 16, 1996). One Seventh Circuit opinion has held that "we will review *de novo* the reliability of the scientific facts, data, and techniques utilized by [the expert] in deriving his opinion," *Cella v. United States*, 998 F.2d 418, 423 (7th Cir. 1993), while a subsequent one has limited the use of that standard only to determinations regarding "the reliability of an entire *class* of scientific evidence"[5] — as opposed to those for individual experts. *See Mars v. United States*, 25 F.3d 1383, 1384 (7th Cir. 1994) (criticizing *Cella*).

The Third Circuit also rejects a traditional abuse of discretion standard of review, instead applying a heightened abuse of discretion standard or "hard look" to expert determinations in certain circumstances. *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 749-50 (3rd Cir. 1994) (expert testimony issues do not require the same deference upon review as do other evidentiary

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[4] Many of the cases cited by the government for the proposition that the appropriate standard of review in this case was for abuse of discretion (Opp. 8-10) do not involve reliability determinations. *See United States v. Nobles*, 422 U.S. 225, 241-242 n.16 (1975); *Hamling v. United States*, 418 U.S. 87, 108 (1974); *Salem v. United States Lines Co.*, 370 U.S. 31, 35 (1962); *United States v. Anderson*, 61 F.3d 1290, 1297 (7th Cir.), *cert. denied*, 116 S.Ct. 543 (1995).

[5] This case, of course, presents that type of class question: whether or not expert psychological testimony, such as that of the "victimologist" in this case, is sufficiently reliable to qualify under *Daubert*.

issues, because "evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses and thus is often not significantly more difficult on a cold record"), *cert. denied sub nom. General Elec. Co. v. Ingram*, 115 S.Ct. 1253 (1995).

Finally, the remaining circuits typically apply an abuse of discretion standard of review to determinations of reliability, as the First Circuit did in this case. *E.g., United States v. Powers*, 59 F.3d 1460, 1471 (4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3485 (U.S. Jan. 16, 1996) (No. 95-6391); *Carroll v. Morgan*, 17 F.3d 787, 789 (5th Cir. 1994); *Watkins v. Schriver*, 52 F.3d 769, 771 (8th Cir. 1995); *Daubert v. Merrell Dow Pharmaceutical, Inc.*, 43 F.3d 1311, 1315 (9th Cir.), *cert. denied*, 116 S.Ct. 189 (1995)[6]; *United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995).

## III. THE FIRST CIRCUIT'S HOLDING THAT A THREAT OF DEPORTATION TO A FRIENDLY COUNTRY AMOUNTS TO "PHYSICAL OR LEGAL COERCION" WARRANTS REVIEW BY THIS COURT.

The Petition also urged that the First Circuit's holding below that a threat of deportation to a friendly country could amount to the compulsion required to violate 18 U.S.C. § 1584 under *United States v. Kozminski*, 487 U.S. 931 (1988), was directly in conflict with the holding of the Second Circuit in *United States v. Shackney*, 333 F.2d 475, 487 (2d Cir. 1964). The government contends that the First Circuit did not base its holding on Petitioner's threat to have Gedara deported. (Opp. 10). The opinion makes clear, however, that the threat of deportation was indeed the linchpin of the court's ruling. Although the First Circuit acknowledged other alleged facts such as lack of nourishment and some instances of physical abuse (Pet. 12a-13a),

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[6] The government points out that the Petition incorrectly listed the Ninth Circuit as rejecting an abuse of discretion standard for reliability determinations. (*See* Opp. 9.)

the court failed to find in them the "requisite 'compulsion,'" which requires more than "exceedingly bad" circumstances. (Pet. 13a). The court upheld Petitioner's conviction solely because it found that the jury could have reasonably believed that the "victim" viewed deportation to be "at least as severe as imprisonment, particularly when viewed in light of her 'special vulnerabilities.'" (Pet. 14a (footnote omitted); *see id.* at 15a.)[7]

Contrary to the government's contention, *Shackney* is not distinguishable simply because the victims there were to be deported to Mexico, the country from which they came. The government contends that the threats of deportation in this case were far worse than in *Shackney* because the "victim" here would have been sent back to Kuwait, which the government claims "was not her country of origin," and would have been prevented from "returning to her family in Sri Lanka." (Opp. 11). This ignores the fact that the victim's "country of origin" for her entry into the United States — *i.e.*, the country from which she came — was Kuwait, not Sri Lanka. (Pet. 1a-2a). Moreover, the record demonstrates that she was able to travel freely between Kuwait and Sri Lanka, having at least twice voluntarily left Sri Lanka for work in Kuwait, and having returned to Sri Lanka in between to escape the Gulf War (Tr. 4-57 to 4-61).

Despite the government's efforts to rewrite the First Circuit opinion, this case presents a clear conflict with *Shackney* as to whether and in what circumstances the threat of deportation alone can satisfy the compulsion requirement of *Kozminski*. This case has also vividly demonstrated that this Court's opinion in *Kozminski* offers little guidance to either defendants or courts

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[7] Contrary to the government's characterization, even the "other threats and warnings" cited by the Court of Appeals (Pet. 14a n.10; *see* Opp. 10) were only relevant to the extent that they "provided further support" for the conclusion that "a threat of deportation in these circumstances plausibly may equate with imprisonment" (*see* Pet. 14a n.10).

regarding the proper standard for a conviction for involuntary servitude.[8]

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

MARC E. MILLER
(Counsel of Record)
MCLEOD, WATKINSON & MILLER
One Massachusetts Avenue, N.W.
Suite 800
Washington, D.C. 20001
(202) 842-2345

*Counsel for Petitioner*

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[8] The government in its Opposition fails to address the confusion caused by *Kozminski*, presumably because there is little to say other than that the opinion — and thus, the statute in question — requires substantial and immediate clarification.